DOCKET

No. 13-502

Title:	Clyde Reed, et al., Petitioners v. Town of Gilbert, Arizona, et al.
Docketed:	October 21, 2013
Lower Ct:	United States Court of Appeals for the Ninth Circuit
Case Nos.:	(11-15588)
Decision Date:	February 8, 2013
Rehearing Denied:	July 24, 2013

Questions Presented

—Date—	——Proceedings and Orders——
Oct 21 2013	Petition for a writ of certiorari filed. (Response due November 20, 2013)
Oct 31 2013	Waiver of right of respondents Town of Gilbert, Arizona, et al. to respond filed.
Nov 19 2013	Motion for leave to file amici brief filed by Professors Ashutosh Bhagwat, et al.
Nov 26 2013	DISTRIBUTED for Conference of December 13, 2013.
Nov 26 2013	Response Requested. (Due December 26, 2013)
Dec 14 2013	Order extending time to file response to petition to and including February 24, 2014.
Feb 19 2014	Brief of respondents Town of Gilbert, Arizona, and Adam Adams in opposition filed.
Mar 5 2014	DISTRIBUTED for Conference of March 21, 2014.
Mar 5 2014	Reply of petitioners Clyde Reed, et al. filed. (Distributed)
Jun 30 2014	DISTRIBUTED for Conference of June 30, 2014.
Jul 1 2014	Motion for leave to file amici brief filed by Professors Ashutosh Bhagwat, et al. GRANTED.
Jul 1 2014	Petition GRANTED.
Jul 9 2014	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the petitioners.
Jul 18 2014	The time to file the joint appendix and petitioners' brief on the merits is extended to and including September 15, 2014.
Aug 1 2014	The time to file respondents' brief on the merits is extended to and including October 31, 2014.
Sep 2 2014	The time to file respondents' brief on the merits is further extended to and including November 14, 2014.
Sep 15 2014	Joint appendix filed. (Statement of costs filed.)
Sep 15 2014	Brief of petitioners Clyde Reed, et al. filed.
Sep 22 2014	Brief amicus curiae of the United States filed.

Sep 22 2014	Brief amicus curiae of General Conference of Seventh-Day Adventists filed.
Sep 22 2014	Brief amicus curiae of The Becket Fund for Religious Liberty filed.
Sep 22 2014	Brief amicus curiae of Justice and Freedom Fund filed.
Sep 22 2014	Brief amici curiae of Christian Legal Society, et al. filed.
Sep 22 2014	Brief amici curiae of Robert Wilson, et al. filed.
Sep 22 2014	Brief amici curiae of State of West Virginia, et al. filed.
Sep 22 2014	Brief amicus curiae of Pacific Legal Foundation filed.
Sep 22 2014	Brief amicus curiae of Family Research Council filed.
Sep 22 2014	Brief amici curiae of Liberty Counsel and National Hispanic Christian Leadership Council filed.
Sep 22 2014	Brief amicus curiae of Christian Life Commission of the Missouri Baptist Convention filed.
Sep 22 2014	Brief amicus curiae of The American Center for Law and Justice filed.
Oct 9 2014	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Nov 14 2014	Brief of respondents Town of Gilbert, Arizona, et al. filed.
Nov 21 2014	SET FOR ARGUMENT ON Monday, January 12, 2015.
Nov 21 2014	Brief amici curiae of National League of Cities, et al., filed.
Dec 2 2014	CIRCULATED.
Dec 2 2014	Record requested from U.S.C.A. 9th Circuit.
Dec 2 2014	Record received from U.S.C.A. 9th Circuit, the record is electronic and located on PACER.
Dec 2 2014	Record received from U.S.D.C. District of Arizona, the record is electronic and located on PACER.
Dec 15 2014	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Dec 15 2014	Reply of petitioners Clyde Reed, et al. filed. (Distributed)
Jan 12 2015	Argued. For petitioners: David A. Cortman, Lawrenceville, Ga. For United States as amicus curiae: Eric J. Feigin, Assistant to the Solicitor General, Department of Justice, Washington, D.C. For respondents: Philip W. Savrin, Atlanta, Ga.
Mar 3 2015	Letter from counsel for the petitioners filed. (Distributed)
Jun 18 2015	Judgment REVERSED and case REMANDED. Thomas, J., delivered the opinion of the Court, in which Roberts, C. J., and Scalia, Kennedy, Alito, and Sotomayor, JJ., joined. Alito, J., filed a concurring opinion, in which Kennedy and Sotomayor, JJ., joined. Breyer, J., filed an opinion concurring in the judgment. Kagan, J., filed an opinion concurring in the judgment, in which Ginsburg and Breyer, JJ., joined.

PETITION FOR WRIT OF CERTIORARI

RECORD
AND
BRIEFS

13- 502

Supreme Court, U.S.
FILED
OCT 21 2013
OFFICE OF THE CLERK
SUPREME COURT, U.S.

NO. _

IN THE
Supreme Court of the United States

PASTOR CLYDE REED; AND GOOD NEWS COMMUNITY CHURCH,

Petitioners,

v.

TOWN OF GILBERT, ARIZONA; AND ADAM ADAMS, IN HIS OFFICIAL CAPACITY AS CODE COMPLIANCE MANAGER,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

Kevin H. Theriot
Jeremy D. Tedesco
Alliance Defending Freedom
15100 N. 90th Street
Scottsdale, AZ 85260
(480) 444-0020

David A. Cortman
Counsel of Record
Rory T. Gray
Alliance Defending Freedom
1000 Hurricane Shoals Rd.
N.E., Ste. D-1100
Lawrenceville, GA 30043
dcortman@alliance
defendingfreedom.org
(770) 339-0774

Counsel for Petitioners

QUESTION PRESENTED

The Town of Gilbert's Sign Code categorizes temporary signs based on their content and then restricts their size, duration, location, and other characteristics depending on the category into which each sign is placed. Under the Sign Code, Good News Community Church's temporary signs promoting church services receive far worse treatment than temporary signs promoting political, ideological, and various other messages, even though they equally impact Gilbert's interests in safety and aesthetics. By finding the Sign Code content neutral and upholding it under the First Amendment, the Ninth Circuit deepened a three-way conflict among eight Courts of Appeals.

The question presented is:

Does Gilbert's mere assertion of a lack of discriminatory motive render its facially content-based sign code content-neutral and justify the code's differential treatment of Petitioners' religious signs?

PARTIES TO THE PROCEEDING

Petitioners are Good News Community Church and its pastor, Clyde Reed. Respondents are the Town of Gilbert, Arizona, and Adam Adams in his official capacity as the Town's Code Compliance Manager.

CORPORATE DISCLOSURE STATEMENT

Good News Community Church does not have any parent companies, and no entity has any ownership interest in it.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF AUTHORITIES vi

INTRODUCTION 1

DECISIONS BELOW 4

STATEMENT OF JURISDICTION 5

PERTINENT CONSTITUTIONAL PROVISIONS AND THE TOWN'S SIGN CODE 5

STATEMENT OF THE CASE 6

A. Factual Background 6

1. Gilbert's Sign Code 6

2. Petitioners' Signs Inviting People to their Church Services. 11

B. Procedural Background 13

REASONS FOR GRANTING THE WRIT 18

I. The Ninth Circuit's Decision Magnifies a Long-Standing, Three-Way Circuit Conflict Concerning the Proper Test for Determining Whether a Sign Ordinance Is Content-Neutral 19

A. The First, Second, Eighth, and Eleventh Circuits Use a Text-Based Test to Determine the Content-Neutrality of a Sign Ordinance. 21

B. The Fourth, Sixth, and Ninth Circuits Use a Motive-Based Test to Determine the Content-Neutrality of a Sign Ordinance. 22

C. The Third Circuit Uses a Context-Sensitive Test to Determine the Content-Neutrality of a Sign Ordinance. 25

D. The Circuit Conflict Is Mature, Entrenched, and Acknowledged. 26

II. The Ninth Circuit's Test for Content-Neutrality Conflicts with this Court's Free Speech Precedent. 27

A. This Court Determines Content-Neutrality Based on the Regulation's Plain Text. 27

B. This Court Has Expressly Rejected that a Lack of Discriminatory Motive or a Content-Neutral Purpose Can Save a Content-Based Code. 32

III. The Question Presented Is Extremely Important and Squarely Presented through a Clean Vehicle. 34

CONCLUSION 36

APPENDIX:

Ninth Circuit Opinion Affirming District Court's Summary Judgment Ruling (02/08/13) 1a

District Court Order Denying Plaintiff's Motion for Summary Judgment and Granting Defendants' Motion for Summary Judgment (02/11/11) 53a

Ninth Circuit Opinion Affirming in part and Remanding in part District Court's Preliminary Injunction Ruling (11/20/09) 85a

Order Denying Plaintiffs' Second Motion for Preliminary Injunction (09/30/08) 116a

Ninth Circuit Order Denying Petition for Rehearing En Banc (08/02/13) 141a

Excerpts from Town of Gilbert Sign Code, attached as Addendum to Appellants' Opening Brief 142a

Excerpts from 2011 Sign Code, Zoning Code Text Amendments, October 6, 2011, attached as Exhibit to Defendants' Motion to Dismiss Appeal 155a

U.S. Const. amend. I 159a

U.S. Const. amend. XIV, § 1 ..... 159a

TABLE OF AUTHORITIES

***Cases*:**

Boos v. Barry,
485 U.S. 312 (1988).....4

Brown v. Entertainment Merchants Association,
131 S. Ct. 2729 (2011).....35

Brown v. Town of Cary,
706 F.3d 294 (4th Cir. 2013) 22-23, 26

Carey v. Brown,
447 U.S. 455 (1980).....17, 27, 29-30, 34

City of Cincinnati v. Discovery Network, Inc.,
507 U.S. 410 (1993).....21, 28, 30, 32-35

City of Los Angeles v. Alameda Books, Inc.,
535 U.S. 425 (2002).....29

Consolidated Edison Company of New York, Inc. v. Public Service Commission of New York,
447 U.S. 530 (1980).....29

H.D.V.-Greektown, LLC v. City of Detroit,
568 F.3d 609 (6th Cir. 2009) 23, 26

Matthews v. Town of Needham,
764 F.2d 58 (1st Cir. 1985).....22

Melrose, Inc. v. City of Pittsburgh,
613 F.3d 380 (3d Cir. 2010).....25

Members of City Council of City of Los Angeles v. Taxpayers for Vincent,
466 U.S. 789 (1984).....28

Metromedia, Inc. v. City of San Diego,
453 U.S. 490 (1981).....17, 31, 35

Minneapolis Star and Tribune Company v. Minnesota Commissioner of Revenue,
460 U.S. 575 (1983).....32

National Advertising Company v. Town of Babylon,
900 F.2d 551 (2d. Cir. 1990).....22

Neighborhood Enterprises, Inc. v. City of St. Louis,
644 F.3d 728 (8th Cir. 2011).....22

Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville,
508 U.S. 656 (1993).....14

Police Department of Chicago v. Mosley,
408 U.S. 92 (1972).....4, 17, 27, 29, 33, 35

R.A.V. v. City of St. Paul, Minnesota,
505 U.S. 377 (1992).....28

Rappa v. New Castle County,
18 F.3d 1043 (3d Cir. 1994).....25

Simon & Schuster, Inc. v. Members of New York State Crime Victims Board,
502 U.S. 105 (1991).....32

Solantic, LLC v. City of Neptune Beach,
410 F.3d 1250 (11th Cir. 2005).....21

Sorrell v. IMS Health Inc.,
131 S. Ct. 2653 (2011).....28, 31, 35

Turner Broadcasting System, Inc. v. FCC,
512 U.S. 622 (1994).....4, 21, 28, 33

United States v. Playboy Entertainment Group, Inc.,
529 U.S. 803 (2000).....35

Verizon Communications, Inc. v. FCC,
535 U.S. 467 (2002).....16

Statutes:

A.R.S. § 16-201 9

A.R.S. § 16-204(B), (E), & (F).....9

Other Authorities:

Brian J. Connolly, Environmental Aesthetics and Free Speech: Toward a Consistent Content Neutrality Standard for Outdoor Sign Regulation, 2 Mich. J. Envtl. & Admin. L. 185 (2012) 26, 35

INTRODUCTION

The Town of Gilbert's Sign Code severely restricts Petitioners' church invitation signs, purportedly in the name of safety and aesthetics. Yet the Code broadly permits the proliferation of political, ideological, and several other types of temporary signs that impact Gilbert's interests in exactly the same way.

Gilbert's Code severely restricts this:

Excerpts of R. 873, 9th Cir. Case No. 11-15588, ECF No. 8 (hereinafter "ER").

But broadly permits this:

ER 204.

This striking differential impact on similar signs results from the Sign Code being content-based on its face. It establishes categories for temporary signs, such as Political Signs, Ideological Signs, Qualifying Event Signs, Homeowners Association Signs, Real Estate Signs, and more. The Code then imposes vastly different size, duration, number, location, and other requirements within each content-based category.

Gilbert has enforced §4.402P of the Sign Code, which regulates signs promoting the events, meetings, or activities of certain non-profit groups, against Petitioners. These Qualifying Event Signs

receive far worse treatment than other temporary signs. For example, Political Signs can be up to 32 square feet, placed in rights-of-way (regardless of whether they relate to a Gilbert event), displayed for five months if there is a primary election and over two months if there is no primary, and are unlimited in number. In contrast, Petitioners' signs can be a mere 6 square feet, may be placed in rights-of-way (only if they relate to a Gilbert event), may be displayed for just 14 hours, and are limited to 4 per property.

Despite the clear, content-based nature of Gilbert's Sign Code, the Ninth Circuit ruled (over a strong dissent by Judge Watford) that it is content-neutral. In so doing, it landed on the wrong side of a long-standing, three-way conflict involving at least eight Courts of Appeals regarding the proper test for judging the content-neutrality of a sign ordinance. The Ninth Circuit joined the Fourth and Sixth Circuits in employing a subjective "motive-based test" that excuses facial content-based discrimination so long as the government professes a lack of discriminatory motive or a content-neutral justification. The Third Circuit utilizes a multi-factor balancing test designed to determine when the value of certain speech in a particular location justifies a content-based exemption from a sign regulation. These tests directly conflict with the objective standard this Court and the First, Second, Eighth, and Eleventh Circuits employ. Under it, a speech regulation is content-based if it makes content-based distinctions on its face, regardless of governmental purpose or motive.

The need for this Court's intervention is great. It should grant review and resolve the circuit conflict in favor of this Court's objective content-neutrality standard established in *Police Department of Chicago v. Mosley*, 408 U.S. 92 (1972), which has been repeatedly reaffirmed. As Justice Brennan aptly observed, this standard "provides clear guidance," allowing governments to "ascertain the scope of impermissible regulation" and individuals to "ascertain the scope of their constitutional protection." *Boos v. Barry* 485 U.S. 312, 336 (1988) (Brennan, J., concurring). In stark contrast, a motive-based test, like that employed by the Fourth, Sixth, and Ninth Circuits, "plunges courts into the morass of legislative motive, a notoriously hazardous and indeterminate inquiry," *id.*, which scarcely provides the clarity and predictability so dearly needed to protect fundamental free speech rights.

A motive-based test also gives regulators a road map on how to establish legal cover for laws that "suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion," *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 641 (1994), the very risks this Court's content-neutrality test is designed to prevent.

DECISIONS BELOW

Lower courts have entered four pertinent opinions in this matter. The district court's unreported ruling denying the Petitioners' second motion for preliminary injunction is reprinted in the Appendix (App.) at 116a-140a. The Ninth Circuit

opinion affirming in part and remanding in part the district court's preliminary injunction order is reported at 587 F.3d 966 and reprinted at App. 85a-115a.

The district court's unreported ruling granting Respondents' motion for summary judgment, and denying that of Petitioners, is available at No. CV 07–522–PHX–SRB, 2011 WL 5924381 (D. Ariz. Feb. 11, 2011) and reprinted at App. 53a-84a. The Ninth Circuit panel opinion affirming the district court's summary judgment ruling is reported at 707 F.3d 1057 and reprinted at App. 1a-52a.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Ninth Circuit rendered its decision on February 8, 2013. The Ninth Circuit denied the petition for rehearing en banc on July 24, 2013. App. 141a. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

PERTINENT CONSTITUTIONAL PROVISIONS AND THE TOWN'S SIGN CODE

The text of the First and Fourteenth Amendments to the United States Constitution is found at App. 159a. Gilbert's Sign Code, and the most recent amendments to it, are set forth at App. 142a-158a.

STATEMENT OF THE CASE

A. Factual Background

No material facts are disputed in this case. The face of Gilbert's Sign Code is permeated with content-based distinctions among signs. *See* App. 142a-158a.

1. Gilbert's Sign Code

Gilbert's Sign Code defines "signs" as "[a] communication device, structure, or fixture that incorporates graphics, symbols, written copy, and/or lighting " ER 620. Gilbert asserts two interests in regulating signs: "safety and aesthetics." ER 768 ¶ 24; ER 746 ¶ 24. Code violators are subject to penalties ranging from a notice of violation to substantial fees and jail time. ER 305 at 20:12-21:1.

Gilbert's restrictions on signs differ widely based on what they say. For example, here are just a few of the Code's content-based classifications of temporary signs:

- Political Sign: "A temporary sign which supports candidates for office or urges action on any other matter on the ballot of primary, general and special elections relating to any national, state or local election." App. 154a.

- Ideological Sign: "[A] sign communicating a message or ideas for non-commercial purposes that is not a Construction Sign, Directional Sign, Temporary Directional Sign Relating to a Qualifying

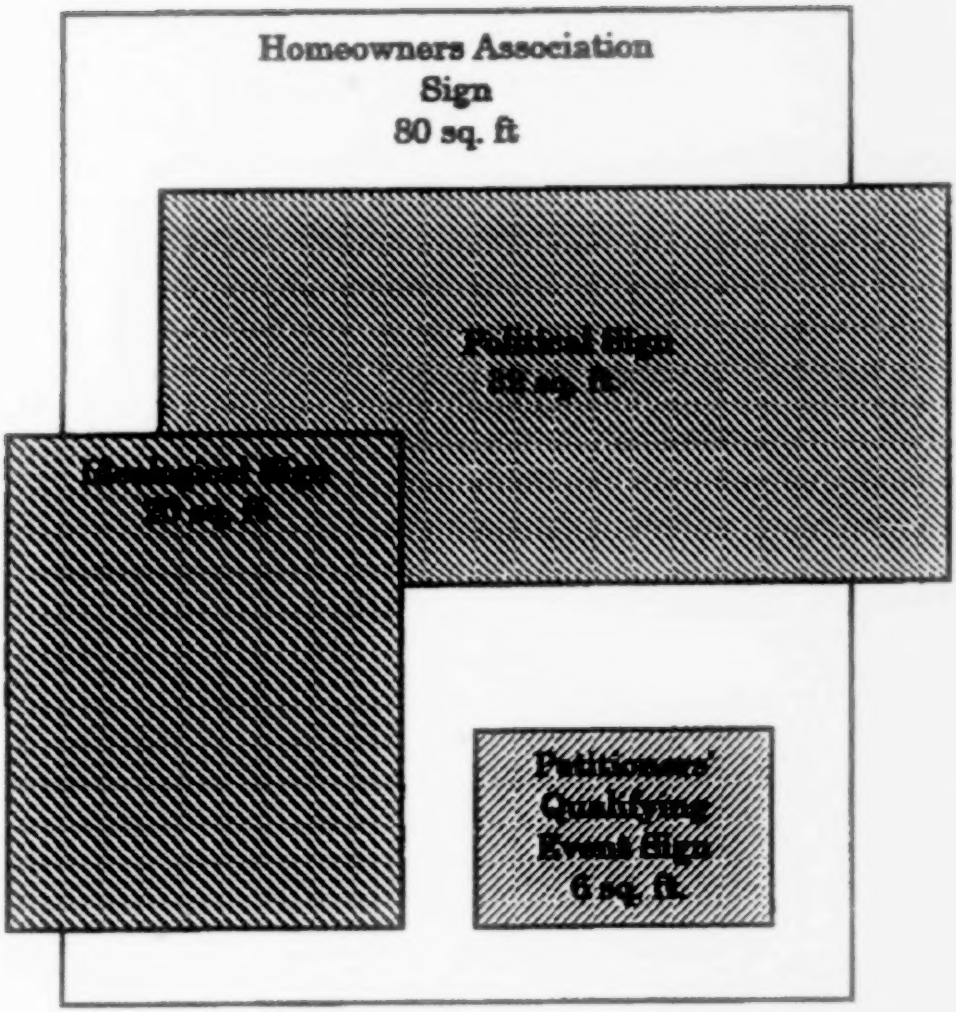
Event, Political Sign, Garage Sale Sign, or a sign owned or required by a governmental agency." App. 153a-154a.

- Qualifying Event Sign: "[A] temporary sign intended to direct pedestrians, motorists, and other passersby to a 'qualifying event.' A 'qualifying event' is any assembly, gathering, activity, or meeting sponsored, arranged, or promoted by a religious, charitable, community service, educational, or other similar non-profit organization." App. 154a.

- Homeowners Association Facilities Temporary Sign: "Banners and Directional Signs that display information concerning seasonal or temporary events occurring in the development." App. 153a.

- Real Estate Sign: "A temporary sign advertising the sale, transfer, lease, or exchange of real property." App. 154a.

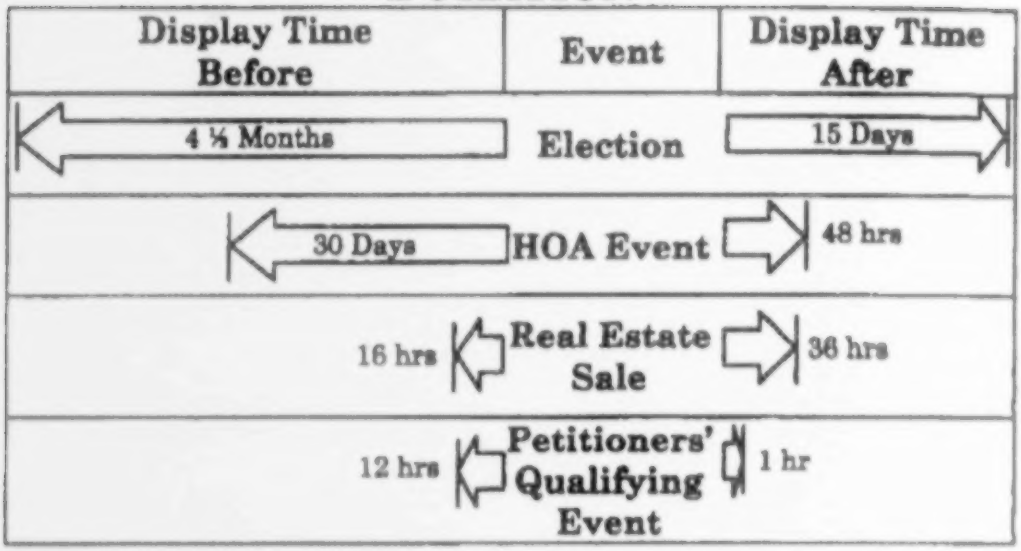
Under Gilbert's Sign Code, the content of a temporary sign determines its size, duration, number, location, whether it must relate to an event occurring within Gilbert, and whether it requires a permit. This pictorial representation (drawn to scale) shows how the Code regulates a sign's size based on its content:



App. 147a, 148a, 153a.

Gilbert's Code also regulates a sign's duration based on content. Consider, for example, the Code's application to four Saturday events that begin at 8:00 a.m., each lasting 12 hours: (1) a polling station open for an election with a primary, (2) a weekend real estate sale, (3) a HOA's community festival, and (4) a religious event hosted by a nonprofit organization (such as Petitioners' church). The chart below illustrates how long each sign could be displayed under the Code's content-based approach:

DURATION



App. 149a, 151a, 153a, 156a, 158a.[1] Moreover, an ideological sign expressing an individual's views about any of the above events could be displayed indefinitely. App. 148a.

The Code also regulates number, location, permit requirements, and whether a sign must relate to a Gilbert event based on a sign's content, as the following table sets out:

---

[1] Under the Code, candidates who prevail in a primary may display their signs for *the additional ten weeks* between the primary and general elections. App. 156a; Ariz. Rev. Stat. § 16-201 (providing that primary elections occur ten weeks prior to general elections). Moreover, under Arizona law, elections may occur on the second Tuesday in March, the third Tuesday in May, the tenth Tuesday before the first Tuesday after the first Monday in November (primary elections), and the first Tuesday after the first Monday in November. A.R.S. § 16-204(B), (E), & (F). With four election days spread out evenly over a year, and the generous duration the Code provides Political Signs, such signs are permitted to be on display every day of the year in Gilbert.

Sign Type	Number	Right-of-Way	Permit
Political	Unlimited	Yes	No
Ideological	Unlimited	Yes	No
Qualifying Event	4 per property, only if the event occurs within the Town.	Yes, only if the event occurs within the Town.	No
HOA	As many as desired, up to 80 sq. ft. aggregate.	Yes	Yes
Real Estate	15	Yes	Yes

App. 145a-148a, 150a, 152a, 153a, 157a.

Gilbert has classified Petitioners' signs promoting their church services as temporary, Qualifying Event Signs and applied §4.402P of the Sign Code. App. 117a. Under this provision, Petitioners' signs receive far worse treatment in relation to size, duration, location, and other characteristics than similar temporary signs, including political, ideological, HOA and real estate signs, as demonstrated above.

The content-based features of the Sign Code do not end there. It exempts over twenty categories of signs from its permit requirement. App. 6a & n.1, 144a-147a. Many of these exemptions describe the exempted signs based on content. *Id.*

The Code further treats some commercial speech better than noncommercial speech by granting signs advertising weekend home sales significantly more leeway than the Qualifying Event Signs of certain

nonprofit organizations.[2] For example, Gilbert allows sellers of real estate to fill out a one-page form, pay a nominal fee, and obtain a year-long, easily-renewable, rubber-stamp permit to place fifteen signs, in rights-of-way, promoting home sale events every weekend of the year from Friday at 4:00 p.m. until Monday at 8:00 a.m. ER 328 (permit application); ER 341 (specifying $115 fee); App. 150a-152a, 158a. Petitioners testified that they would gladly do the same to receive more favorable treatment under the Sign Code than what the Qualifying Event Sign provision provides. ER 185-86 ¶ 48.[3]

2. Petitioners' Signs Inviting People to their Church Services.

Petitioner Clyde Reed is the Pastor of Good News Community Church. App. 54a. The Church is a group of like-minded Christians who have joined together to pursue common religious beliefs and purposes. ER 767 ¶ 14. The Church meets on Sundays to learn biblical lessons, sing religious songs, pray for their community, and encourage others whenever possible. *Id.* ¶ 15.

---

[2] The Code does not treat all nonprofit speech the same. For example, political nonprofits posting signs about candidates or ballot issues receive far more favorable treatment under the Code's Political Signs provision than do Petitioners under the Qualifying Event Sign provision.

[3] Of course, to pass muster under the First Amendment, *all* temporary signs—political, ideological, etc.—would have to be regulated in the same manner.

Petitioners follow the Great Commission from the Book of Matthew, in which Jesus exhorts Christians to "go and make disciples of all nations, baptizing them in the name of the Father and of the Son and of the Holy Spirit, and teaching them to obey everything I have commanded you." App. 4a-5a; ER 771 ¶¶ 43-44. Petitioners discharge this religious duty by reaching out to people in their community and inviting them to attend their Church. App. 5a; ER 771 ¶¶ 45-46.

Petitioners' signs "announc[e] their services as an invitation for those in the community to attend." App. 5a. The district court correctly ruled that "[i]t is beyond dispute that [Petitioners'] signs communicate a religious message" and that they therefore "fall within the category of protected speech." App. 128a & n.3. The Town concedes this. ER 173 ¶ 56; ER 165 ¶ 56 (admitting that "[Petitioners'] signs are speech that is protected by the First Amendment"). Petitioners' signs typically state the Church's name and the phrase "Your Community Church," provide the Church's website address, phone number, location, and service time, and direct people to the service. App. 88a.

The Church rents space for its Sunday worship services from local school districts. App. 87a; ER 772 ¶ 52; ER 495 at 6:8-9:10. The Church has a small congregation, averaging between 25-30 adults and 4-10 children per week, App. 54a, and very limited financial means, ER 771 ¶ 50. Due to the Church's temporary facilities, restricted finances, and limited manpower, posting signs is an essential means by

which Petitioners make others aware of their Church services. App. 54a; ER 771 ¶¶ 50-51.

Gilbert has enforced its Sign Code against Petitioners multiple times. Town officials twice cited them for violating a previous version of the Qualifying Event Signs provision, §4.402P. App. 117a. A town official also warned Pastor Reed that the Sign Code would be enforced against Petitioners if they placed signs that violated its terms. *Id.*

Petitioners are suppressing their religious speech to avoid having the Code enforced against them, including associated fines and potential jail time. ER 774 ¶¶ 77-78. Petitioners' desire to immediately place signs on equal terms with those Gilbert has assigned a different content-based category and accorded more favorable treatment. *Id.*

B. Procedural Background

Petitioners filed this 42 U.S.C. § 1983 lawsuit against the Respondents in March 2007, seeking declaratory and injunctive relief and nominal damages. App. 117a. Shortly thereafter, Petitioners moved for a preliminary injunction enjoining enforcement of §4.402P against their signs. *Id.* At the time, §4.402P applied only to signs placed by a "religious assembly." ER 769 ¶ 30. The district court granted an injunction to which Respondents stipulated. App. 117a-118a.

Gilbert subsequently adopted an amended Code on January 8, 2008. App 118a. The amendment applied §4.402P to signs promoting the meetings,

events, and activities of several different nonprofit organizations, App. 122a-123a, thereby broadening the number of sign placers subject to its onerous restrictions. Because the amended Code disadvantaged them "in the same fundamental way" as the original Code, *Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville*, 508 U.S. 656, 662 (1993), Petitioners filed an amended verified complaint challenging Gilbert's original and amended Codes both facially and as-applied and a second motion for preliminary injunction, App. 118a, which the court denied. App. 140a. The district court limited its ruling, however, to the constitutionality of §4.402P of the Code in isolation.

The Ninth Circuit affirmed the lower court's narrow ruling without reaching Petitioners' primary claim, *i.e.*, that Gilbert's Code impermissibly makes content-based distinctions among noncommercial signs. App. 45a-46a. It remanded for consideration of that question and stressed that Petitioners' claim could not be decided without comparing how the Code regulates other signs similar to theirs. App. 115a. Indeed, the court flagged the Code's differential treatment of noncommercial signs as a potential constitutional problem. *Id.* (noting that "Ideological Signs, Political Signs, and Qualifying Event Signs face[] different restrictions and requirements" and remanding for the district court "to consider the First Amendment and Equal Protection claims that the Sign Code is unconstitutional in favoring some noncommercial speech over other noncommercial speech"). The court also observed that "Gilbert has adopted a sign

ordinance that makes one's head spin to figure out the bounds of its restrictions and exemptions." App. 95a.

On remand, the parties agreed to resolve all remaining issues on summary judgment. App. 56a. After discovery, the parties filed cross-motions for summary judgment. *Id.* On February 11, 2011, the court entered an order granting Gilbert's motion, and denying that of Petitioners. App. 83a-84a.

Petitioners timely appealed to the Ninth Circuit. While Petitioners' appeal was pending, Gilbert amended its code yet again. App. 17a. The amendment permitted Qualifying Event Signs within rights-of-way, which had previously been expressly prohibited. *Id.* It also added a new restriction that applied solely to Qualifying Event Signs, *i.e.*, that they must relate to events held within the town. *Id.* Gilbert's amendment was clearly targeted at Petitioners, as they had moved their Church services (several years before) to a school located a few blocks across the Gilbert border in Chandler, Arizona. App. 87a n.1. The amendment barred Petitioners from placing their church signs in Town rights-of-way because (at that time) their services occurred just outside of Gilbert, yet simultaneously permitted the placement of political, ideological, and additional temporary signs that do not relate to Gilbert events within rights-of-way. The Town conceded, for example, that Political Signs have no in-town "situs," Defs.' Ans. Br. 31, 9th Cir. Case No. 11-15588, ECF No. 13, yet they are liberally permitted within rights-of-way.

Importantly, the "Gilbert events only" amendment did not resolve but rather expanded upon the Code's existing content-based restrictions related to the size, duration, etc., of Petitioners' signs. The amendment left these restrictions intact, and added *yet another* content-based restriction on their speech. The Ninth Circuit thus rightly ruled that the amendment did not moot Petitioners' claims, stressing that it actually increased the barriers to their ability to erect church signs. App. 20a (noting that the amendment "bars [Petitioners] from erecting any [church] signs at all").[4]

The Ninth Circuit, in a 2-1 opinion, affirmed the lower court's summary judgment decision. App. 45a. Despite previously highlighting the Code's differential treatment of noncommercial signs, the majority excused these content-based distinctions

---

[4] The Ninth Circuit did not specifically reach the constitutionality of the "Gilbert events only" amendment. This Court could address that issue since it was fully briefed and passed upon below, *Verizon Commc'ns., Inc. v. FCC*, 535 U.S. 467, 530 (2002) (recognizing that this Court may review "[a]ny issue 'pressed or passed upon' below by a federal court"), but it need not do so. The Ninth Circuit squarely ruled that the Code's numerous other content-based restrictions on Petitioners' signs related to size, duration, etc., are content-neutral. The amendment further restricting Qualifying Event signs to "Gilbert events only" is simply one more content-based limitation on Petitioners' speech.

Moreover, the Town's rightly rejected mootness argument is now itself moot, since beginning on November 3, 2013, Petitioners will once again be holding their Church services at a facility in Gilbert. Thus, Petitioners' signs will satisfy the "Gilbert events only" amendment. They will still be subject, however, to the other content-based limitations Gilbert's Code imposes on their signs.

based on its findings that "Gilbert did not adopt its regulation of speech because it disagreed with the message conveyed" and because "Gilbert's interests in regulat[ing] temporary signs are unrelated to the content of the sign." App. 31a-32a. The majority thus affirmed the district court's ruling in Gilbert's favor on Petitioners' free speech claim. App. 44a-45a. It also affirmed the court's rejection of their free exercise, equal protection, and vagueness and overbreadth claims. App. 45a.

In his dissent, Judge Watford highlighted numerous flaws with the majority's analysis, including its inconsistency with this Court's precedent. Relying on *Mosley*, *Carey v. Brown*, 447 U.S. 455 (1980), and *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981), Judge Watford found that "Gilbert's sign ordinance violates the First and Fourteenth Amendments by drawing content-based distinctions among different categories of non-commercial speech." App. 49a. He observed that "the most glaring illustration" of these content-based distinctions is "the ordinance's favorable treatment of 'political' and 'ideological' signs relative to the treatment accorded the non-commercial signs [Petitioners] seek to display." *Id.*

Judge Watford recognized that to sustain its content-based distinctions, Gilbert "must explain why (for example) a 20–square–foot sign displayed indefinitely at a particular location poses an acceptable threat to traffic safety and aesthetics if it bears an ideological message, but would pose an unacceptable threat if the sign's message instead invited people to attend Sunday church services."

App. 51a. He noted the absence of any such explanation, and his doubts that Gilbert could come up with one. *Id.*

Instead, Judge Watford noted that "[w]hat we are left with is Gilbert's apparent determination that 'ideological' and 'political' speech is categorically more valuable, and therefore entitled to greater protection from regulation, than speech promoting events sponsored by non-profit organizations." *Id.* But as Judge Watford rightly observed, the First and Fourteenth Amendments forbid Gilbert from making that kind of value judgment. *Id.*

The Ninth Circuit denied a timely petition for rehearing en banc. App. 141a. This appeal followed.

REASONS FOR GRANTING THE WRIT

This Court's review is needed to resolve an important question of First Amendment law: the proper test for judging whether a sign ordinance is content-neutral. Eight Courts of Appeals are divided over this question, employing three separate tests. Several of these courts have expressly noted this entrenched circuit conflict.

Under the Fourth, Sixth, and Ninth Circuits' test, a content-based sign code is still deemed content-neutral if the government asserts a pure legislative motive, or a content-neutral justification. The Third Circuit follows a different test, which permits content-based exemptions from a sign regulation where the value of a particular message at a particular location overrides the interests

supporting the underlying regulation. These tests directly conflict with the standard established by this Court and followed by the First, Second, Eighth, and Eleventh Circuits, under which content-neutrality is judged by a law's terms, regardless of the government's regulatory motive or purpose.

This conflict is highly developed in the sign code context, yet it has tremendous significance for free speech rights generally. Indeed, the content-neutrality principle is a hallmark of this Court's First Amendment jurisprudence that applies to the regulation of signs and all other modes of expression. Absent this Court's intervention, the Third, Fourth, Sixth, and Ninth Circuits will continue applying the lenient time, place, and manner test to content-based laws deserving strict scrutiny review. Permitting these courts' errant tests to persist will jeopardize free speech rights in the sign code and all other contexts and exacerbate a circuit conflict long ripe for this Court's resolution.

This Court should intervene and restore an objective standard for gauging sign codes' content neutrality, a recurring free speech issue with broad ramifications for the First Amendment.

I. The Ninth Circuit's Decision Magnifies a Long-Standing, Three-Way Circuit Conflict Concerning the Proper Test for Determining Whether a Sign Ordinance Is Content-Neutral.

This case presents a circuit conflict involving eight Courts of Appeals that utilize at least three

different tests to decide a critical question of First Amendment law: whether a sign code is content-neutral. As set out below, these divergent tests have led to widely different outcomes when applied to sign codes that are facially content-based in similar ways.

Following a standard consistent with this Court's precedent, *see* § II, *infra*, the First, Second, Eighth, and Eleventh Circuits follow a "text-based test," under which content-neutrality is determined objectively based on the regulation's plain terms. The Fourth, Sixth, and Ninth Circuits follow a subjective "motive-based test," which permits content-based distinctions on the face of a code so long as the government asserts a neutral justification or lack of censorial motive for the regulation. The Third Circuit employs a "context-sensitive test," which permits content-based distinctions on the face of a code pursuant to a multi-part, convoluted balancing test that purports to determine instances where the value of certain speech in certain locations exceeds the government's overarching regulatory purpose.

Gilbert concedes the existence of this circuit conflict. It claims that the Ninth Circuit "is part of the majority of circuits that follows" what Gilbert calls "a more practical test for assessing content neutrality" and recognizes that this test conflicts with that of the Eighth and Eleventh Circuits. Defs.' Resp. to Pet. for Reh'g En Banc 9-10, 9th Cir. Case No. 11-15588, ECF No. 36. While Petitioners do not necessarily agree with Gilbert's framing of the conflict, it is noteworthy that Gilbert has conceded its existence.

A. The First, Second, Eighth, and Eleventh Circuits Use a Text-Based Test to Determine the Content-Neutrality of a Sign Ordinance.

The Eleventh Circuit's opinion in *Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250 (11th Cir. 2005), is illustrative of the text-based test. There, the city's sign code exempted certain signs from a permit requirement and other limitations. *Id.* at 1255-58. Because many of the exemptions were "based on the content of the [signs'] message," the court held that the code "discriminates against certain types of speech based on content." *Id.* at 1258.

For example, the court found the exemption for flags and insignia of a "government, religious, charitable, fraternal, or other organization" content-based. This exemption was content-based because it resulted in a government or religious organization being able to fly its flag freely, "whereas an individual seeking to fly a flag bearing an emblem of his or her own choosing would have to apply for a permit to do so, and would have to abide by all of the [additional] restrictions enumerated" in the code. *Id.* at 1264. Importantly, relying on this Court's decisions in *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993), and *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994), the court expressly refused to adopt a motive-based test. *Solantic*, 410 F.3d at 1259 n.8.

The First, Second, and Eighth Circuits follow the same approach as the Eleventh Circuit. For

example, in *Neighborhood Enterprises, Inc. v. City of St. Louis*, 644 F.3d 728 (8th Cir. 2011), the city's code set out a "sign" definition, but then exempted several content-based categories of signs from its scope, including national, state, religious, fraternal, professional and civic symbols or crests. *Id.* at 736-37, 739. It also exempted fourteen categories of signs, several of which were described based on content, from its permit requirement. *Id.* at 740-42. The Eighth Circuit found the code content-based, notwithstanding the city's assertion of a content-neutral justification for its code, because it made "impermissible distinctions based *solely* on the content or message conveyed by the sign." *Id.* at 737 (citation omitted). *See also Matthews v. Town of Needham*, 764 F.2d 58, 60 (1st Cir. 1985) (sign code found content-based where it facially banned political signs but permitted for sale, professional office, and religious and charitable cause signs); *Nat'l Adver. Co. v. Town of Babylon*, 900 F.2d 551, 557 (2d Cir. 1990) (sign code found content-based because it facially exempted political signs and signs identifying a grand opening, parade, festival, fund drive or similar occasion from a general sign ban).

B. The Fourth, Sixth, and Ninth Circuits Use a Motive-Based Test to Determine the Content-Neutrality of a Sign Ordinance.

In conflict with the First, Second, Eighth, and Eleventh Circuits, the Fourth, Sixth, and Ninth Circuits follow a "motive-based test." The Fourth Circuit's decision in *Brown v. Town of Cary*, 706 F.3d 294 (4th Cir. 2013), exemplifies this approach.

There, the court held that a sign code "may distinguish speech based on its content so long as its reasons for doing so are not based on the message conveyed." *Id.* at 301. Under this approach, "[c]ontent neutrality bars only one particular sort of distinction—those made with a censorial intent." *Id.*

Although *Brown* involved a sign code that exempted "holiday decorations," "public art," and six other categories of signs from numeric and size limitations, *id.* at 298 & n.1, the Fourth Circuit found the code content-neutral because it was not "adopted because of a disagreement with the message conveyed," *id.* at 304. It also excused the code's content-based distinctions based on its finding that they had "a reasonable relation" to the town's asserted neutral justifications for enacting the code —traffic safety and aesthetics. *Id.* at 306. It excused the code's content-based discrimination despite recognizing that the exempted signs likely posed the same threat to the town's interests as those subject to the code's regulations. *Id.* at 304.

The Sixth Circuit likewise follows the motive-based test. *H.D.V.-Greektown, LLC v. City of Detroit*, 568 F.3d 609 (6th Cir. 2009), involved a Detroit sign code that contained separate definitions for advertising signs, business signs, and political signs and imposed varying height restrictions depending on the content-based category into which a sign was placed. *Id.* at 622. Embracing the motive-based test, the court stated that "an ordinance is not a content-based regulation of speech if," among other things, "the regulation was not adopted because of disagreement with the message

the speech conveys." *Id.* at 621. Applying this test, the court found the code content-neutral, despite its facially content-based provisions, because there was "nothing in the record to indicate that the distinctions between the various types of signs reflect a meaningful preference for one type of speech over another." *Id.*

The Ninth Circuit's opinion below adopts the motive-based test. The court noted that the "critical issue" before it was "whether the Sign Code improperly regulates noncommercial temporary signs based on their content." App. 23a. And it had previously observed that Gilbert's Code defines "Ideological Signs, Political Signs, and Qualifying Event Signs" differently, subjecting each to "different restrictions and requirements." App. 115a. On its face, the Code plainly makes content-based distinctions among temporary signs, and as-applied treats Petitioners' church signs far worse than political, ideological and other signs placed by both for-profit and non-profit groups. Nonetheless, the Ninth Circuit held that Gilbert's Code is content-neutral based on its findings that (1) "Gilbert did not adopt its regulation of speech because it disagreed with the message conveyed," and (2) "Gilbert's interests in regulat[ing] temporary signs are unrelated to the[ir] content." App. 31a-32a. This holding epitomizes the motive-based test for determining content-neutrality. By adopting this test, the Ninth Circuit exacerbated the already well-developed circuit conflict.

C. The Third Circuit Uses a Context-Sensitive Test to Determine the Content-Neutrality of a Sign Ordinance.

The Third Circuit created a distinct path for determining whether a sign code is content-neutral. The court describes this approach as the "context-sensitive" test. *Melrose, Inc. v. City of Pittsburgh*, 613 F.3d 380, 389 (3d Cir. 2010).

Under that test, content-based distinctions among signs are upheld where the following conditions are met: (1) the government exempts a sign from general sign regulations where "there is a significant relationship between the content of particular speech and a specific location or its use," (2) the exemption was not made "in an attempt to censor certain viewpoints or to control what issues are appropriate for public debate," (3) "the exception is substantially related to advancing an important state interest that is at least as important as the interests advanced by the underlying regulation," (4) "the exception is no broader than necessary to advance the special goal," and (5) "the exception is narrowly drawn so as to impinge as little as possible on the overall goal." *Rappa v. New Castle Cnty.*, 18 F.3d 1043, 1065 (3d Cir. 1994).

Applying this test in *Rappa*, the court ruled that "a 'For Sale' sign is entitled to greater protection under the First Amendment than a 'Rappa for Congress' sign, merely because of the coincidence of location." *Id.* at 1087 (Garth, J., dissenting). As the dissenting Judge rightly observed, the context-

sensitive test "turns the First Amendment on its head." *Id.*

D. The Circuit Conflict Is Mature, Entrenched, and Acknowledged.

This eight court, three-way circuit conflict is squarely presented here. Courts have acknowledged it. *Brown*, 706 F.3d at 302 (noting the test employed by the Fourth and Sixth Circuits for judging the content-neutrality of a sign code conflicts with the test used by the Eighth and Eleventh Circuits);[5] *H.D.V.-Greektown*, 568 F.3d at 622-23 (noting that its approach to judging content-neutrality directly conflicted with that of the Eleventh Circuit in *Solantic* but explicitly declining to "rely on its rationale").

Commentators have highlighted it. Brian J. Connolly, Environmental Aesthetics and Free Speech: Toward a Consistent Content Neutrality Standard for Outdoor Sign Regulation, 2 Mich. J. Envtl. & Admin. L. 185, 189 (2012) ("There has been a divergence in the judicial treatment of sign regulations, with some courts applying strict prohibitions against regulations that distinguish among signs based on content, and other courts using a more relaxed standard").

And as noted above, Gilbert concedes its existence.

---

[5] *Brown* claimed that the Third Circuit belongs on its side of the conflict, but, as explained *supra*, the Third Circuit has set out yet a third test for judging the content-neutrality of sign codes.

This Court should resolve the mature, entrenched, and well-recognized conflict presented by this petition. And it should resolve it in favor of this Court's objective standard for judging content-neutrality that focuses on a law's language, rather than the alleged motive of those who enacted it.

II. The Ninth Circuit's Test for Content-Neutrality Conflicts with this Court's Free Speech Precedent.

A. This Court Determines Content-Neutrality Based on the Regulation's Plain Text.

Under this Court's free speech precedent, a speech regulation that contains content-based distinctions on its face is subject to strict scrutiny, regardless of the government's motive or purpose. In *Mosley*, for example, the Court evaluated an ordinance that banned picketing within 150 feet of schools, except when it involved school labor disputes. 408 U.S. at 93.[6] The Court held that the

---

[6] This Court decided *Mosley* and *Carey* on equal protection grounds, yet in both cases this Court explicitly grounded the content-neutrality test in the First Amendment as well. *Mosley*, 408 U.S. at 95 ("[U]nder the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views"); *Carey*, 447 U.S. at 462 n.6 ("The First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic") (citation omitted). This Court has also oft-cited *Mosley* and *Carey* when addressing the content-neutrality test

"central problem" with the ordinance was that it "describe[d] permissible picketing in terms of its subject matter," and that it made the "operative distinction" between lawful and unlawful picketing "the message on a picket sign." *Id.* at 95. The ordinance thus violated a cardinal rule of the First Amendment: "that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Id.*

This Court has repeatedly reaffirmed, in a wide variety of contexts, that content-neutrality is judged by a law's terms. *Turner*, 512 U.S. at 643 ("As a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based"); *see also Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2663 (2011) (law deemed content-based because "[o]n its face [it] enact[ed] content- and speaker-based restrictions on the sale, disclosure, and use of prescriber-identifying information"); *Discovery Network*, 507 U.S. at 429 (ordinance that banned newsracks containing "commercial handbills" but permitted those with "newspapers" was content-based because the ban's application depended on "the content of the publication resting inside that newsrack"); *Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984) (reaffirming that government may not "regulate speech in ways that favor some viewpoints

---

in free speech cases. *See, e.g., R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 382 (1992) (citing, *inter alia*, *Mosley* for the proposition that "[c]ontent-based regulations are presumptively invalid" under the First Amendment).

or ideas at the expense of others" and finding that a sign ordinance was content-neutral because its "text [was] neutral—indeed silent—concerning any speaker's point of view"); *Carey*, 447 U.S. at 460-61 (picketing ordinance content-based because "on its face, the Act accords preferential treatment to the expression of views on one particular subject").

Succinctly put: "[W]hether a statute is content neutral or content based is something that can be determined on the face of it; if the statute describes speech by content then it is content based." *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 448 (2002) (Kennedy, J., concurring).

Gilbert's Sign Code contravenes this rule in multiple ways. On its face, the Code regulates a particular mode of expression, temporary signs, in a manner this Court has expressly deemed content-based: "by classifications formulated in terms of the[ir] subject [matter]." *Mosley*, 408 U.S. at 95. It then imposes widely different size, duration, location, number, and other requirements that correspond to the content-based category into which a sign is placed. In short, the Code's regulations concerning the size, duration, and other aspects of temporary signs fail the content-neutrality test because they are not "applicable to all speech irrespective of content." *Consol. Edison Co. of New York, Inc. v. Pub. Serv. Comm'n of New York*, 447 U.S. 530, 536 (1980) (citation omitted). Regulating these aspects of signs differently based solely on what they say is patently content-based discrimination. The Ninth Circuit's holding that it is not squarely contradicts this Court's precedent.

This Court has also repeatedly held that regulations that make arbitrary distinctions among speech predicated on judgments concerning its relative value are not content-neutral. For example, in *Carey*, the State proffered its interest in "providing special protection for labor protests" to justify a law granting preferential treatment to such protests. This Court rejected the State's justification because it "forthrightly presupposes that labor picketing is more deserving of First Amendment protection than are public protests over other issues." 447 U.S. at 466. Similarly, in *Discovery Network* the city attempted to save its content-based regulation of newsracks by claiming that "commercial speech has 'low value.'" 507 U.S. at 429. This Court rejected that this "naked assertion" concerning the value of certain forms of speech could transmute the city's plainly content-based regulation into a content-neutral law. *Id.*

The Ninth Circuit's opinion runs headlong into these precedents. The court explicitly accepted Gilbert's arguments that it justifiably treated political and ideological signs more favorably than Petitioners' religious signs because (1) the "Political Signs exemption responds to the need for communication about elections" and (2) the "Ideological Sign exemption recognizes that an individual's right to express his or her opinion is at the core of the First Amendment." App. 26a. As Judge Watford observed in his dissent below, these are "precisely the value judgment[s] that the First and Fourteenth Amendments forbid Gilbert to make." App. 51a.

Moreover, Gilbert's Code is content-based because it grants over twenty exemptions from its permit requirement, many times based on the exempted sign's content. Such content-based exemptions from general rules plainly run afoul of the First Amendment's content-neutrality rule. *See Sorrell*, 131 S. Ct. at 2663 (striking down law regulating prescriber-identifying information because it "forbids sale subject to exceptions based in large part on the content of the purchaser's speech"); *Metromedia*, 453 U.S. at 514 (content-based exemptions of certain noncommercial signs from general ban on billboards rendered ordinance content-based).

Gilbert's Code also regulates based on content by favoring some commercial signs over Petitioners' (and some other nonprofits') noncommercial signs. As noted *supra*, signs promoting weekend home sales receive more favorable treatment than the signs of nonprofit organizations, like Petitioners, promoting their events and activities. Gilbert's preference for commercial over noncommercial signs violates the general rule that the government "may not conclude that the communication of commercial information is of greater value than the communication of noncommercial messages." *Metromedia*, 453 U.S. at 513.

B. This Court Has Expressly Rejected that a Lack of Discriminatory Motive or a Content-Neutral Purpose Can Save a Content-Based Code.

Despite the clear content-based nature of Gilbert's Code, the Ninth Circuit held that it was content-neutral based on its findings that (1) Gilbert was not motivated by disagreement with Petitioners' message and (2) Gilbert's justification for regulating signs was content-neutral. App. 31a-32a.

The Ninth Circuit's reliance on Gilbert's allegedly pure motives to save a plainly content-based code simply cannot be squared with this Court's repeated admonitions that motive is irrelevant to determining content-neutrality. For example, in *Discovery Network*, the city asserted that its regulation favoring newsracks holding newspapers over those containing commercial handbills was content-neutral because "there [was] no evidence that [it] ha[d] acted with animus toward" the latter. 507 U.S. at 429. This Court responded that "just last Term we expressly rejected the argument that 'discriminatory treatment is suspect under the First Amendment only when the legislature intends to suppress certain ideas.'" *Id.* (quoting *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 117 (1991)). Similarly, in *Minneapolis Star and Tribune Company v. Minnesota Commissioner of Revenue*, 460 U.S. 575, 592 (1983), this Court held that "[i]llicit legislative intent is not the *sine qua non* of a violation of the First Amendment."

The Ninth Circuit's notion that an alleged content-neutral justification can overcome a multitude of content-based sins also conflicts with this Court's case law. In *Turner*, this Court expressly held that "the mere assertion of a content-neutral purpose" cannot "save a law which, on its face, discriminates based on content." 512 U.S at 642-43. Moreover, in *Discovery Network* the city argued that its ordinance was content-neutral because "the *justification* for the regulation," ensuring safety and aesthetics, was "content-neutral." 507 U.S. at 429. But this Court rejected the city's argument that "the test for whether a regulation is content based turns on the 'justification' for the regulation." *Id.* Rather, the Court stressed the ordinance's plain text, noting that "the very basis for the regulation is the difference in content between ordinary newspapers and commercial speech." *Id.* Although the city's interests may have justified limiting the total number of newsracks, this Court recognized that they did not justify selective, content-based regulation of newsracks. *Id.* at 429. This was especially true where all newsracks impacted the city's asserted interests in precisely the same way regardless of the content of the publications contained therein. *Id.*

Similarly, in *Mosley* the city argued that its "ordinance [was] not improper content censorship" because it was adopted to serve a content-neutral purpose: preventing school disruptions. 408 U.S. at 99. Observing that all picketing posed the same risks to the city's purported interest, the Court found it illegitimate for the city to pick and choose which

picketers were allowed to impair its interest based on the content of their expression. *Id.* at 100-102. This Court rejected a comparable argument in *Carey*, concluding that the state's interest in ensuring the privacy of the home did not render a facially content-based regulation of picketing near residences content-neutral. 447 U.S. at 464-65. Again, the Court noted that the content-based treatment of picketing was especially problematic considering all picketing impacted the state's interest in the same manner. *Id.*

In stark contrast, the Ninth Circuit held that Gilbert's alleged content-neutral justification transforms its content-based regulation of temporary signs into a content-neutral regulation of speech. App. 31a-32a. In fact, the court accepted the very justifications this Court rejected in *Discovery Network*—safety and aesthetics. Further, it accepted these justifications even though the mode of communication (here, temporary signs) impacts Gilbert's asserted interests in exactly the same way *regardless of their content*. There is simply no way to reconcile the Ninth Circuit's holding with this Court's longstanding precedent.

III. The Question Presented Is Extremely Important and Squarely Presented through a Clean Vehicle.

The question presented by this petition has wide-ranging national impact. First Amendment challenges to sign regulations are legion. Between 2001 and 2006 sign placers filed *over 100 cases* nation-wide challenging municipal sign ordinances

that restricted their right to place signs, and "these challenges have continued unabated since that time." Connolly, *supra*, at 188. Resolving this entrenched conflict in favor of the bright-line rule adopted by this Court would provide much needed clarity and uniform rules to sign regulators and placers alike. This increased predictability would also likely decrease litigation in this contentious area.

The conflict has broader implications as well. Indeed, the principle of content-neutrality is constant regardless of whether the government is regulating signs, billboards, *Metromedia*, picketing, *Mosley*, newsracks, *Discovery Network*, prescriber-identifying information, *Sorrell*, cable broadcasting signals, *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000), or video games, *Brown v. Entertainment Merchants Association*, 131 S. Ct. 2729 (2011). If left intact, the errant tests employed by the Third, Fourth, Sixth, and Ninth Circuits will jeopardize free speech rights in the above contexts and more because courts will apply, as the Ninth Circuit did below, the lenient time, place, and manner test—rather than strict scrutiny—to content-based regulations of speech. The risk of this occurring is particularly high considering that the government nearly always asserts a lack of discriminatory intent, or a content-neutral purpose, or both (as it did in each case cited above), when litigants claim speech regulations are content-based.

Moreover, this case presents an ideal vehicle for resolving the question presented. The relevant facts

are not in dispute. And the Court can resolve the question presented based simply on the face of Gilbert's Sign Code. The critical issue of First Amendment law raised by this petition is thus squarely presented.

Further, all aspects of Petitioners' free speech claim were thoroughly briefed and argued below and the Ninth Circuit definitively resolved that claim in favor of Gilbert. There is nothing left for any lower court to do.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Court grant review.

Respectfully submitted,

Kevin H. Theriot
Jeremy D. Tedesco
Alliance Defending Freedom
15100 N. 90th Street
Scottsdale, AZ 85260
(480) 444-0020

David A. Cortman
Counsel of Record
Rory T. Gray
Alliance Defending Freedom
1000 Hurricane Shoals Rd. N.E., Ste. D-1100
Lawrenceville, GA 30043
dcortman@alliance defendingfreedom.org
(770) 339-0774

October 21, 2013

APPENDIX

APPENDIX TABLE OF CONTENTS

Ninth Circuit Opinion Affirming District Court's Summary Judgment Ruling (02/08/13) 1a

District Court Order Denying Plaintiff's Motion for Summary Judgment and Granting Defendants' Motion for Summary Judgment (02/11/11) 53a

Ninth Circuit Opinion Affirming in part and remanding in part District Court's Preliminary Injunction Ruling (11/20/09) 85a

Order Denying Plaintiffs' Second Motion for Preliminary Injunction (09/30/08) 116a

Ninth Circuit Order Denying Petition for Rehearing En Banc (08/02/13) 141a

Excerpts from Town of Gilbert Sign Code, attached as Addendum to Appellants' Opening Brief 142a

Excerpts from 2011 Sign Code, Zoning Code Text Amendments, October 6, 2011, attached as Exhibit to Defendants' Motion to Dismiss Appeal 155a

U.S. Const. amend. I 159a

U.S. Const. amend. XIV, § 1 ..... 159a

Filed: February 8, 2013

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CLYDE REED, Pastor and GOOD NEWS COMMUNITY CHURCH,
Plaintiffs-Appellants,

v.

TOWN OF GILBERT, ARIZONA and ADAM ADAMS, in his official capacity as Code Compliance Manager,
Defendants-Appellees.

No. 11-15588

D.C. No.

2:07-cv-00522-SRB

OPINION

Appeal from the United States District Court
for the District of Arizona
Susan R. Bolton, District Judge, Presiding

Argued and Submitted
August 10, 2012—San Francisco, California

Filed February 8, 2013

Before: Consuelo M. Callahan and Paul J. Watford, Circuit Judges, and James K. Singleton, Senior District Judge.*

Opinion by Judge Callahan;
Dissent by Judge Watford

---

* The Honorable James K. Singleton, Senior District Judge for the U.S. District Court for Alaska, sitting by designation.

SUMMARY**

Civil Rights

The panel affirmed the district court's summary judgment, on remand from the Ninth Circuit, in an action brought by Good News Community Church and its pastor alleging that the Town of Gilbert's sign ordinance, which restricted the size, duration and location of temporary directional signs, was unconstitutional because it favored some noncommercial speech over other noncommercial speech.

Accepting the prior opinion in *Reed v. Town of Gilbert*, 587 F.3d 966 (9th Cir. 2009), as law of the case, the panel concluded that the sign ordinance was constitutional because the different treatment of types of noncommercial temporary signs was not content-based as that term was defined in *Reed*, and the restrictions were tailored to serve significant governmental interests. The panel also concluded that the ordinance did not violate Good News' (or its members') right to the free exercise of religion or right to equal protection of law, and was not unconstitutionally vague or overbroad. In addition,

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

the panel determined that the amendments to the sign ordinance made by the Town of Gilbert during the pendency of the appeal did not moot the case and that Good News could file a new action in the district court should it wish to challenge the new provisions of the sign ordinance.

Dissenting, Judge Watford agreed with the majority that the post-judgment amendments to the Town of Gilbert's sign ordinance did not render this appeal moot. Judge Watford disagreed with the majority's conclusion that the sign ordinance was constitutional, and would hold that the ordinance violated the First and Fourteenth Amendments by drawing content-based distinctions among different categories of non-commercial speech.

COUNSEL

Jeremy D. Tedesco (argued), Scottsdale, Arizona, and David A. Cortman, Lawrenceville, Georgia, for Plaintiffs-Appellants.

Robert Grasso, Jr., Kim S. Alvarado (argued), and Jenny J. Winkler, Grasso Law Firm, P.C., Chandler, Arizona, for Defendants-Appellees.

OPINION

CALLAHAN, Circuit Judge:

Good News Community Church and its pastor, Clyde Reed (referred to collectively as "Good News"),

appeal from the district court's determination on remand from the Ninth Circuit that the Town of Gilbert's ordinance that restricts the size, duration and location of temporary directional signs does not discriminate between different forms of noncommercial speech in a unconstitutional manner. In *Reed v. Town of Gilbert*, 587 F.3d 966 (9th Cir. 2009), we held that the ordinance (sometimes referred to as the "Sign Code") is not a content-based regulation and is a reasonable time, place and manner restriction. However, we remanded the case to the district court "to consider the First Amendment and Equal Protection claims that the Sign Code is unconstitutional in favoring some noncommercial speech over other noncommercial speech." *Id.* at 983.

Accepting our opinion in *Reed* as law of the case, we conclude that the Sign Code is constitutional because the different treatment of types of noncommercial temporary signs are not content-based as that term is defined in *Reed*, and the restrictions are tailored to serve significant governmental interests. In addition, we determine that the amendments to the Sign Code made by the Town of Gilbert ("Gilbert") during the pendency of this appeal do not moot this case and that Good News may file a new action in the district court should it wish to challenge the new provisions of the Sign Code.

I.

Good News is a relatively small church with 25 to 30 adult members and 4 to 10 children. "Members

of Good News believe the Bible commands them to go and make disciples of all nations, and that they should carry out this command by reaching out to the community to meet together on a regular basis. To do so, they display signs announcing their services as an invitation for those in the community to attend." *Reed,* 587 F.3d at 971 (internal quotation marks omitted). Starting around 2002, Good News met at an elementary school in Gilbert. *Id.* It presently rents space at an elementary school in Chandler, Arizona, which borders Gilbert.

For a time, Good News placed about 17 signs in the area surrounding its place of worship in Gilbert announcing the time and location of its services. In 2005, Good News received an advisory notice from Gilbert that it was violating the town's sign ordinance because "the signs were displayed outside the statutorily-limited time period." For a while thereafter, Good News reduced the number of signs it erected and the amount of time its signs were in place, but friction with Gilbert persisted. *Reed,* 587 F.3d at 972. In March 2008, Good News filed suit in federal court in Arizona alleging that Gilbert's Sign Code violated the Free Speech Clause of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. *Id.*

A. The Sign Ordinances

Like many municipalities, Gilbert regulates the display of outdoor signs. Gilbert Land Development Code, Division 4, General Regulations, Article 4.4 (the "Sign Code"). Section 4.401(A) outlines the purposes for the Sign Code, namely, to "assure

proper and efficient expression through visual communications involving signs compatible with the character and environment of the Town; to eliminate confusing, distracting, and unsafe signs; and to enhance the visual environment of the Town of Gilbert."

Under § 4.402(A), no person may erect a sign without first obtaining a sign permit, unless the sign is one exempted under § 4.402(D). Section 4.402(D) lists nineteen different types of signs that are allowed without a permit.[1] Three of the types of exempted signs are of particular relevance: "Temporary Directional Signs Relating to Qualifying Event," "Political Signs," and "Ideological Signs."

Gilbert asserts, and Good News concedes, that Good News' signs are Temporary Directional Signs subject to the requirements of § 4.402(P). This

---

[1] The nineteen types of signs are:

> (1) Signs installed by a governmental jurisdiction; (2) Building Identification Signs; (3) Permanent Regulatory and Parking Signs; (4) Information Wall Signs (e.g., "Delivery Entrance"); (5) Real Estate Signs; (6) Residential Open House Signs; (7) Political Signs; (8) Ideological Signs; (9) Garage Sale Signs; (10) Business Identification Banners during street construction; (11) Interim Business Identification Banners; (12) Boutique Signs; (13) Window Signs; (14) A–Frame Signs; (15) Temporary Directional Signs Relating to a Qualifying Event; (16) Construction Signs; (17) Suspended Signs (particular type of commercial sign); (18) Restaurant Menu Signs; and (19) Required Street Addresses.

Reed, 587 F.3d at 972 n.2.

subsection provides that "Temporary Directional Signs Relating to a Qualifying Event shall be no greater than 6 feet in height and 6 square feet in area," "shall only be displayed up to 12 hours before, during and 1 hour after the qualifying event ends," "may be located off-site and shall be placed at grade level," and "shall be placed only with the permission of the owner of the property on which they are placed." Additional restrictions include that "[n]o more that 4 signs shall be displayed on a single property at any one time," and that Temporary Directional Signs may not be placed "in a public right-of-way"[2] or on "fences, boulders, planters, other signs, vehicles, utility facilities, or any structure."

A "Political Sign" is defined as a "temporary sign which supports candidates for office or urges action on any other matter on the ballot of primary, general and special elections." Political Signs (a) may be up to 32 square feet in size, (b) may be erected any time prior to an election but must be taken down within 10 days of the election, (c) are not limited in number, and (d) may be placed in the public right-of-way. An "Ideological Sign" is a "sign communicating a message or ideas for noncommercial purposes that is not a construction sign, directional sign, temporary directional sign, temporary directional sign relating to a qualified event, political sign, garage sale sign, or sign owned or required by a governmental agency." Ideological Signs (a) may be up to 20 square feet in size, (b) are not limited in time, (c) are not

---

[2] In October 2011, Gilbert amended the Sign Code to allow placement of Temporary Directional Signs within the public right-of-way.

limited in number, and (d) may be placed in the public right-of-way.

B. Initial Proceedings in the District Court

Gilbert initially stipulated to a preliminary injunction, but when Gilbert amended the Sign Code in a way that Good News believed continued to infringe on its constitutional rights, Good News filed a second motion for a preliminary injunction. In September 2008, the district court denied Good News' motion for an injunction, concluding that: (a) "§ 4.402(P) is a content-neutral regulation, and [] it passes the applicable intermediate level of scrutiny;" and (b) the Sign Code "does not violate equal protection, as any uneven effects are an unintended consequence of the lawful content-neutral regulation." *Reed,* 587 F.3d at 973. Good News appealed to the Ninth Circuit.

C. *Reed v. Town of Gilbert,* 587 F.3d 966 (9th Cir. 2009)

In November 2009 we basically affirmed the district court's denial of an injunction. In doing so, we made four determinations that guide our review in this appeal.

1. *Good News alleges an as-applied challenge to the Sign Code*

First, we held that Good News' challenge was an as-applied challenge, and not a facial challenge, to the Sign Code. *Id.* at 974. We determined that Good News' attack on the ordinance was "basically a

challenge to the ordinance as applied to [its] activities," and therefore we limited our analysis of the constitutionality of the ordinance to its application to Good News. *Id.*

2. *The Sign Code is not a content-based regulation*

Second, after reviewing the evolution of our opinions from *Foti v. City of Menlo Park,* 146 F.3d 629 (9th Cir. 1998),to *Menotti v. City of Seattle,* 409 F.3d 1113 (9th Cir. 2005), and *G.K. Limited Travel v. City of Lake Oswego,* 436 F.3d 1064 (9th Cir. 2006) ("*G.K. Ltd.*"), we determined the fact that an enforcement official had to read a sign did not mean that a ordinance is content-based. Instead, we concluded that "our focus should be on determining whether the ordinance targets certain content; whether the ordinance or exemption is based on identification of a speaker or event instead of on content; and whether an enforcement officer would need to distinguish content to determine applicability of the ordinance."[3] *Reed,* 587 F.3d at 976.

---

[3] We quoted from *G.K. Ltd.*, 436 F.3d at 1078, that:

> Neither the speaker- nor event-based exemptions implicate *Foti* insofar as neither requires law enforcement officers to "read a sign's message to determine if the sign is exempted from the ordinance." *Foti,* 146 F.3d at 636. In the speaker category, officers decide whether an exemption applies by identifying the entity speaking through the sign without regard for the actual substance of the message. In the case of event-based exemptions the officer must determine only whether a specific triggering event

Applying this focus to the Sign Code, we found that the ordinance "regulates physical characteristics, such as size, number and construction of the signs," their locations, and the timing of displays, none of which "implicate the content of speech." *Id.* at 977. We noted that "[t]he definition of a Qualifying Event sign merely encompasses the elements of 'who' is speaking and 'what event' is occurring."[4] *Id.* These two criteria invoke the speaker-based and event-based characteristics approved in *G.K. Ltd.* because "the City d[id] not limit the substance of [the] speech in any way." *Id.* (quoting *G.K. Ltd.*, 436 F.3d at 1078). We explained that this case:

> highlights the absurdity of construing the "officer must read it" test as a bellwether of content. If applied without common sense, this principle would mean that every sign, except a blank sign, would be content based. While a Gilbert officer needs to briefly take in what is written on the Qualifying Event Sign to note who is speaking and the timing of the listed event, this "kind of cursory examination" is not akin to an officer synthesizing the expressive content of the sign.

> has occurred and if the temporary sign has been erected within the specified time frame.

Reed, 587 F.3d at 976.

[4] In *Reed* we used "Qualifying Event Sign" to refer to Temporary Directional Signs exempted by § 4.402(P) of the Sign Code. 587 F.3d at 972.

Reed, 587 F.3d at 978. We concluded "that § 4.402(P) is not a content-based regulation: It does not single out certain content for differential treatment, and in enforcing the provision an officer must merely note the content-neutral elements of who is speaking through the sign and whether and when an event is occurring." *Id.* at 979.

3. *The Sign Code is narrowly tailored to further Gilbert's significant interests*

Third, we determined that the Sign Code, "as a content-neutral time, place and manner regulation," *id.* at 978, also had to be, and was, narrowly tailored. Quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989), we recognized that to be "narrowly tailored" the Sign Code had to "serve a significant governmental interest" and had to "leave open ample alternative channels for communication of that information." *Reed*, 587 F.3d at 979. We held that the district court had not abused its discretion in concluding that the Sign Code "is narrowly tailored as it does not sweep in more speech than is necessary to achieve the Town's aesthetic and traffic objectives," 587 F.3d at 980, explaining:

> The restrictions on time, place and manner imposed by Gilbert on the display of Qualifying Events Signs would indeed appear to "actually advance" the aesthetic and safety interests by limiting the size, duration and proliferation of signs. *See G.K. Ltd.*, 436 F.3d at 1073. These measures restricting the number of signs and limiting them to private property do not appear

> substantially broader measures than required to make sure the rights-of-way are not so thicketed with signs as to pose a safety hazard or create an aesthetic blight. The limitation on timing – twelve hours before the event and one hour after – is equally narrowly tailored to meet these interests. While it might be easier and provide broader exposure for Good News to have the sign up for twenty-four hours, the test is not convenience or optimal display.

Id.

We also held that the district court did not abuse its discretion in finding that the Sign Code allowed for alternate channels of communications for Good News to communicate effectively with members of the public. *Id.* at 981. We explained that "[w]hile the alternative options identified by the district court may not be Good News' preference, 'we cannot invalidate the Sign Code merely because it restricts plaintiffs' preferred method of communication.'" *Id.* (quoting *G.K. Ltd.*, 436 F.3d at 1074). We also noted that the alternative modes available did not appear to be especially burdensome. *Id.*

This section of *Reed* concludes with the affirmative statement that:

> Section 4.402(P) is a content-neutral regulation of the time, place and manner of display of Good News' Qualifying Event Signs; the provision is narrowly tailored to further Gilbert's significant interests in

> aesthetics and traffic safety; and Good News has ample alternative channels of communicating its invitation to church services.

Id.

4. *The Sign Code does not favor commercial over noncommercial speech*

The fourth relevant holding in *Reed* is our determination that the district court "did not abuse its discretion in concluding, after close examination, that the Sign Code does not favor commercial speech over non-commercial speech."[5] *Id.* at 982. Our

---

[5] We explained:

> The district court concluded, however, that Good News' "noncommercial speech enjoys fewer restrictions than its commercial counterparts." The court performed a careful comparison of the restrictions placed on Qualifying Event Signs versus "Weekend Directional Signs" for subdivision sales, the commercial speech showcased by Good News as receiving more favorable treatment. The district court concluded that Qualifying Event Signs come out on top as the total number of Qualifying Event Signs allowed is greater; Qualifying Event Signs may be placed during week-days as well as weekends; the size allowed for Qualifying Events Signs is greater; and although the Qualifying Events Signs may not be placed in rights-of-way, they are not restricted to a two-mile radius from the event. Of "paramount importance" to the court was the fact that no permit is required to display a Qualifying Events Sign, in contrast to the permit required for the Weekend Directional Signs.

opinion in *Reed* remanded on a limited issue only: "to consider the First Amendment and Equal Protection claims that the Sign Code is unconstitutional in favoring some noncommercial speech over other noncommercial speech." *Id.* at 983. We noted that "[o]n remand, the district court will have the opportunity to determine whether Gilbert impermissibly 'evaluate[d] the strength of, or distinguished between, various [noncommercial] communicative interests.'" *Id.* at 983 (quoting *Metromedia Inc. v. City of San Diego,* 453 U.S. 490, 514 (1981)).

D. Proceedings on Remand in the District Court

On remand, the parties agreed to submit the case on cross-motions for summary judgment. The district court's order set forth three preliminary determinations. First, based in part on our opinion in *Reed,* the court held that the Sign Code "is a content-neutral regulation of speech that seeks to identify who is speaking and what event is occurring and does not discriminate on the basis of content." Second, citing its preliminary injunction order, the district court reiterated that the Sign Code was narrowly tailored to serve significant government interests. Third, the court embraced as a non-preliminary finding its determination that noncommercial speech is more favorably treated than commercial speech.

Addressing the remanded issue, the district

Id. at 981–82 (footnote omitted).

court thought that the different treatments of various forms of noncommercial speech were "akin to the regulation at issue in *G.K. Ltd.*" The district court reasoned:

> Both Political Signs and Qualifying Event Signs relate, in substance, to events — an election or a specified event fitting the definition in the Sign Code. In the case of Political Signs, the event is of widespread interest and takes place at a fixed, regular interval. A Qualified Event might take place once, or it might take place several times a week, depending on the type of event. A Qualifying Event Sign could invoke so-called "core" speech, but Political Signs are always core speech. To distinguish between a Political Sign and a Qualifying Event Sign, an officer need only skim the sign to determine the speaker (e.g. is a non-profit speaking?) and the event at issue (e.g. does this relate to an election or a Qualifying Event?). In *G.K. Ltd.*, the court concluded that speaker – and – event based exemptions did not render a sign regulation content-based because the municipality was distinguishing on the basis of the speaker's identity and whether a triggering event had occurred, *not* on the basis of the sign's content.
>
> Ideological Signs are not tied to a specific event, the way Political and Qualifying

> Event Signs are, so they are not subject to an event-based time restriction under the Sign Code. This accounts for the different "time" restriction for Ideological Signs. As for place, namely whether a particular type of sign can be placed in the right-of-way, Gilbert argues that it has made a municipal decision to limit the overall number of signs in the right-of-way, and it does not discriminate at all among Ideological Signs. Nonetheless, the Court finds that the Sign Code does not distinguish on the basis of the message of the sign because, other than signs relating to events — whether those events are elections or bake sales — the Sign Code treats all messages on equal footing. Because Ideological Signs do not relate to an event, they are distinguishable from Qualifying Event Signs. To determine whether a sign is an Ideological Sign or a Qualifying Event Sign, an officer does not need to read the content: he or she need only look to see whether the sign concerns an event.

After determining that the Sign Code did not discriminate among types of noncommercial speech, the district court rejected Good News' argument that the Sign Code was impermissibly vague and overbroad. Citing *United States v. Williams,* 553 U.S. 285, 304 (2008), the district court commented that the "[v]agueness doctrine is an outgrowth not of the First Amendment, but of the Due Process Clause of the Fifth Amendment," and that a statute is void if it does not "provide a person of ordinary intelligence fair notice of what is prohibited, or is so

standardless that it authorizes or encourages seriously discriminatory enforcement" The district court determined that the deterrent effect of the Sign Code was "insubstantial and remote" as the "ordinance provides plenty of guidance for people of ordinary intelligence to determine what conduct is permitted and prohibited, and does not foster arbitrary, capricious, or discriminatory enforcement."[6]

E. Gilbert's Motion to Dismiss

Good News filed this appeal from the district court's entry of summary judgment in favor of Gilbert. However, in October 2011, while the appeal was pending, Gilbert made two amendments to its Sign Code: (1) it allowed placement of Temporary Directional Signs within the public right-of-way; and (2) it limited the Temporary Directional Sign exemption to events held within the Town of Gilbert.[7] Based on the amended Sign Code, Gilbert

---

[6] The district court discounted Good News' reliance on Gilbert's officials' responses in depositions to hypothetical situations concerning signs that had both political and ideological information because the officials said that they had never seen such a sign.

[7] Section § 4.402(P)(4) and (5) now read, with the added language in capitals and the omitted language cross-out, as follows:

> 4. *Location.* Temporary Directional Signs Relating to a Qualifying Event may be located off-site and shall be placed at grade level. Signs MAY BE PLACED IN THE RIGHT-OF-WAY OR, WITH PERMISSION OF THE PRIVATE PROPERTY OWNER, ON PRIVATE

filed a motion to dismiss this appeal, arguing that because Good News held its services outside of Gilbert, it does not qualify for the Temporary Directional Sign exemption, and lacks standing to pursue this appeal.

The motion to dismiss presents a situation analogous to that before the Supreme Court in *Northeastern Florida Chapter of Associated General Contractors of America v. City of Jacksonville*, 508 U.S. 656 (1993). In *Northeastern Florida*, the plaintiffs challenged a city ordinance providing preferential treatment to certain minority owned businesses for city contracts. *Id.* at 658. The district court granted the plaintiffs summary judgment, holding that the ordinance was unconstitutional, but the Eleventh Circuit vacated that order finding that the plaintiffs lacked standing. *Id.* at 660. Shortly after the Supreme Court granted certiorari, the city repealed the questioned ordinance and replaced it with new ordinance that provided for a more narrow minority preference. *Id.* at 660–61. The city then filed a motion to dismiss the case as moot.

PROPERTY ~~shall be placed only with the permission of the owner of the property on which they are placed~~. SIGNS SHALL RELATE ONLY TO EVENTS OCCURRING WITHIN THE TOWN.

5. *Prohibited Locations*. Temporary Directional Signs Relating to a Qualifying Event shall not be located:

~~a. In the public right of way.~~

~~b.~~a. On fences, boulders, planters, other signs, vehicles, utility facilities or any structure.

Justice Thomas, writing for the Court, held that the case was not moot. He relied on the Court's "well settled rule" set forth in *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982), that "a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." *Northeastern Florida*, 508 U.S. at 662. Justice Thomas wrote:

> There is no mere risk that Jacksonville will repeat its allegedly wrongful conduct; it has already done so. Nor does it matter that the new ordinance differs in certain respects from the old one. *City of Mesquite* does not stand for the proposition that it is only the possibility that the selfsame statute will be enacted that prevents a case from being moot; if that were the rule, a defendant could moot a case by repealing the challenged statute and replacing it with one that differs only in some insignificant respect.

508 U.S. at 662. The Court concluded that the new ordinance disadvantaged plaintiffs "in the same fundamental way" and thus the case was not moot. *Id.* at 662–63. Justice O'Connor, while dissenting, commented that:

> *City of Mesquite* stands for the proposition that the Court has discretion to decide a case in which the statute under review has been repealed or amended. The Court appropriately may render judgment where circumstances demonstrate that the

> legislature likely will reinstate the old law – which would make a declaratory judgment or an order enjoining the law's enforcement worthwhile. But such circumstances undoubtedly are rare.

Id. at 677.

Good News' case is one of those rare cases. The amendment of the Sign Code to allow directional signs to be placed in the public right-of-way moots Good News' objection to this provision of the Sign Code, but the new restriction, limiting the Temporary Directional Signs exemption to events that take place in Gilbert, bars Good News from erecting any directional signs at all. Thus, a dismissal for mootness would allow Gilbert to continue to limit Good News' speech without further judicial review. Accordingly, the motion to dismiss is denied.[8]

---

[8] The Ninth Circuit cases cited by Gilbert do not support a different result. In *Log Cabin Republicans v. United States*, 658 F.3d 1162, 1166–67 (9th Cir. 2011), we noted that when a statutory repeal or amendment provides a plaintiff with everything it hoped to achieve, the controversy is moot. Similarly, in *Outdoor Media Group, Inc. v. City of Beaumont*, 506 F.3d 895, 901 (9th Cir. 2007), we noted that "[b]ecause there is no longer any risk that Outdoor Media will be subject to the challenged ordinance, there exists no live issue upon which the court could issue prospective relief." Here, Good News has not obtained the relief it seeks and continues to be subject to the limiting ordinance.

II.

Reed limits our consideration of Good News' challenges to the Sign Code. Although our opinion in *Reed* reviewed the denial of a preliminary injunction, our determinations included conclusions of law. Furthermore, on remand, the parties agreed to resolve all remaining issues on cross-motions for summary judgment. There is no indication that the parties engaged in further discovery, and Good News has not asserted any evidentiary facts in this appeal that were not before us in *Reed*. Thus, our opinion in *Reed* constitutes law of the case, *see Minidoka Irrigation Dist. v. Dep't of Interior*, 406 F.3d 567, 573 (9th Cir. 2005),[9] and is binding on us. *See Santamaria v. Horsley*, 110 F.3d 1352, 1355 (1997) ("It is settled law that one three-judge panel of this court cannot ordinarily reconsider or overrule the decision of a prior panel.").

Reed establishes first that "§ 4.402(P) is not a

---

[9] In *Minidoka*, we recognized that, under the law of the case doctrine, "a court is ordinarily precluded from reexamining an issue previously decided by the same court, or a higher court, in the same case." 406 F.3d at 573 (citing *Old Person v. Brown*, 312 F.3d 1036, 1039 (9th Cir. 2002)). We noted that "the law of the case doctrine is subject to three exceptions that may arise when (1) the decision is clearly erroneous and its enforcement would work a manifest injustice, (2) intervening controlling authority makes reconsideration appropriate, or (3) substantially different evidence was adduced at a subsequent trial." Id. (internal quotation marks omitted). None of these exceptions apply here. As we subsequently explain, our opinion in Reed is not "clearly erroneous." Moreover, there is no "intervening controlling authority" nor any "substantially different evidence."

content-based regulation," *Reed*, 587 F.3d at 979, and second that the Sign Code generally is a reasonable (i.e., not unconstitutional) time, place and manner restriction. *Id.* at 980. The single issue remanded, and hence the primary substantive issue before the district court and now on appeal, is whether the Sign Code improperly discriminates between different forms of noncommerical speech.

We review de novo the district court's grant of summary judgment in favor of Gilbert. *G.K. Ltd.*, 436 F.3d at 1070; *Arakaki v. Hawaii*, 314 F.3d 1091, 1094 (9th Cir. 2002) ("We review a district court's grant of summary judgment de novo."); *Lopez v. Smith*, 203 F.3d 1122, 1131 (9th Cir. 2000) (en banc) ("We review de novo a grant of summary judgment").

A. The Evolving Standard for Evaluating the Regulation of Noncommercial Speech

Judicial review of the regulation of noncommercial speech has evolved over the last 30 years. In 1981, Justice White, in his plurality opinion in *Metromedia*, 453 U.S. at 514, stated that while a city "may distinguish between the relative value of different categories of commercial speech, the city does not have the same range of choice in the area of noncommercial speech to evaluate the strength of, or distinguish between, various communicative interests." Seven years later in *National Advertising Co. v. City of Orange*, 861 F.2d 246, 249 (9th Cir. 1988), we recognized that an ordinance would be invalid if it imposed greater restrictions on noncommercial than on commercial

billboards. We noted that a restriction based on content would be unconstitutional unless it was narrowly drawn to serve a compelling interest, but suggested that the city was nonetheless "not powerless to regulate billboards containing noncommercial messages." *Id.* In *Desert Outdoor Advertising, Inc. v. City of Moreno Valley*, 103 F.3d 814, 819 (9th Cir. 1996), we indicated that an ordinance regulating noncommercial speech would be invalid if it imposed greater restrictions on noncommercial than commercial billboards or if it regulated noncommercial billboards "based on their content." Regarding Gilbert's Sign Code, we have already held that it does not impose greater restrictions on noncommercial signs than commercial signs, and thus the critical issue now before us is whether the Sign Code improperly regulates noncommercial temporary signs based on their content.

The definition of "content neutral" has also evolved over the last couple of decades. In *Foti*, relying on *Desert Outdoor*, we indicated that when an officer must examine the contents of a sign to determine whether an exemption applies, the ordinance is content-based. *Foti*, 146 F.3d at 636. However, we also noted the Supreme Court's advice that "laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based," and that a "speech restriction is content neutral if it is justified without reference to the content of the regulated speech." *Id.* at 638 (quoting *Turner Broad. Sys. v. F.C.C.*, 512 U.S. 622, 643 (1994), and *Clark v. Cmty. for Creative, Non-Violence*, 468 U.S. 288, 293

(1984)).

More recently, following these guidelines we have fashioned a more nuanced standard. In *G.K. Ltd.*, we held that "[n]either the speaker- nor event-based exemptions implicate *Foti* insofar as neither requires law enforcement officers to read a sign's message to determine if the sign is exempted from the ordinance." 436 F.3d at 1078. The standard of review set forth is:

> The "government may impose reasonable restrictions on the time, place, or manner of engaging in protected speech provided that they are adequately justified without reference to the content of the regulated speech." *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 428 (1993) (internal quotation marks and citation omitted). In addition to being justified without reference to content, the restrictions must be "narrowly tailored to serve a significant governmental interest and leave open ample alternative channels for communication of the information." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (citing *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

436 F.3d at 1071 (parallel citations omitted).

In *Reed*, applying this standard, we concluded that the Sign Code "does not single out certain content for differential treatment, and in enforcing

the provision an officer must merely note the content-neutral elements of who is speaking through the sign and whether and when an event is occurring." 587 F.3d at 979. Nonetheless, this appeal raises two unanswered questions under the *G.K. Ltd.* standard: (1) are the differing restrictions between types of noncommercial speech "adequately justified without reference to the content of the regulated speech"; and (2) are they narrowly tailored? The first issue is the fulcrum of this appeal.

B. The Restrictions on Types of Noncommercial Speech are not Based on the Content of the Speech.

The thrust of Good News' challenge to the Sign Code is that its different restrictions for different types of noncommercial speech are inherently content-based and thus unconstitutional. However, we rejected this general argument in *Reed* when we held that distinctions based on the speaker or the event are permissible where there is no discrimination among similar events or speakers. 587 F.3d at 979 ("We conclude that § 4.402(P) is not a content-based regulation: It does not single out certain content for differential treatment, and in enforcing the provision an officer must merely note the content-neutral elements of who is speaking through the sign and whether and when an event is occurring."). Thus, under *Reed,* the distinctions between Temporary Directional Signs, Ideological Signs, and Political Signs are content-neutral. That is to say, each classification and its restrictions are based on objective factors relevant to Gilbert's creation of the specific exemption from the permit

requirement and do not otherwise consider the substance of the sign. The Political Signs exemption responds to the need for communication about elections.[10] The Ideological Sign exemption recognizes that an individual's right to express his or her opinion is at the core of the First Amendment. The Temporary Directional Sign exemption allows the sponsor of an event to put up temporary directional signs immediately before the event. Each exemption is based on objective criteria and none draws distinctions based on the particular content of the sign. It makes no difference which candidate is supported, who sponsors the event, or what ideological perspective is asserted. Accordingly, as the speaker and event determinations are generally "content neutral," Gilbert's different exemptions for different types of noncommercial speech are not prohibited by the Constitution.

Our reading of *Reed* is in accord with our opinion in *G.K. Ltd.* There the town ordinance banned most pole signs but had a grandfather clause for preexisting signs. 436 F.3d at 1072. We determined that "the City's restriction on plaintiffs' pole sign is not a content-based regulation of plaintiffs' speech." *Id.* We commented:

> The pole sign restriction is not a "law[ ] that by [its] terms distinguish[es] favored speech from disfavored speech on the basis of the

---

[10] Arizona has enacted legislation that prohibits a city from removing a political sign from the public right-of-way during a 60-day period before a primary election. *See* Ariz. Rev. St. § 16-1019.

> ideas or views expressed." *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 643 (1994). The Code restricts all pole signs across the City's general commercial zones without creating exceptions for preferred content. *Cf. Foti v. City of Menlo Park*, 146 F.3d 629, 636 (9th Cir. 1998). The burdens imposed by these pole sign restrictions are borne equally by all of the City's residents. *See Turner Broad. Sys.*, 512 U.S. at 643. Further, plaintiffs offer no evidence suggesting illicit motive or bias on the part of the City or that the City banned pole signs in general, or their pole sign in particular, because of a desire to stifle certain viewpoints. *See City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984).

Id. at 1071–72 (parallel citations omitted). The plaintiffs in *G.K. Ltd.* argued that ordinance's grandfather clause rendered it content-based because town officials would have to read the pole sign to see if it had changed. *Id.* at 1078. We rejected this argument, explaining:

> Unlike *Foti*'s exemptions, the grandfather clause does not require Lake Oswego officials to evaluate the substantive message on the preexisting sign and the clause certainly does not favor speech "based on the idea expressed." *Id.* at 636 n.7. A grandfather provision requiring an officer to read a sign's message for no other purpose than to determine if the text or logo has changed, making the sign now subject to the City's

> regulations, is not content-based. *See Hill v. Colorado*, 530 U.S. 703, 721 (2000) ("We have never held, or suggested, that it is improper to look at the content of an oral or written statement in order to determine whether a rule of law applies to a course of conduct.").

Id. at 1079 (parallel citations omitted). Under the controlling precedent of *Reed* and *G.K. Ltd.*, Good News has not shown that the Sign Code imposes a content-based limitation.[11]

C. Supreme Court Precedent Affirms our Definition of Content Neutral.

As suggested in *G.K. Ltd.*, our approach is in accord with the Supreme Court's opinion in *Hill v. Colorado*, 530 U.S. 703 (2000). In *Hill*, the plaintiffs challenged "the constitutionality of a 1993 Colorado statute that regulates speech-related conduct within 100 feet of the entrance to any health care facility." *Id.* at 707. In holding that the statute was

---

[11] Our earlier opinions cited by Good News, *City of Orange*, 861 F.2d 246, and *Desert Outdoor*, 103 F.3d at 819, are not contrary to this conclusion. Our opinions have consistently required that the regulation of noncommercial speech be content-neutral (some times expressed as not content-based). *See City of Orange*, 861 F.2d at 249 (holding "only that the City cannot analyze the content of outdoor noncommercial messages to determine whether they are allowed, and if so where"); *see also Desert Outdoor*, 103 F.3d at 820 (holding that the City's ordinance "violates the First Amendment because it regulates noncommercial speech on the basis of content"). *G.K. Ltd.* and *Reed* similarly require that the regulation of noncommercial speech not be content-based, but, as we have explained, apply a more nuanced standard for making that determination.

constitutional, the Supreme Court commented that it had "never held, or suggested, that it is improper to look at the content of an oral or written statement in order to determine whether a rule of law applies to a course of conduct." *Id.* at 721. The Court noted that the statute:

> places no restrictions on – and clearly does not prohibit – either a particular viewpoint or any subject matter that may be discussed by a speaker. Rather, it simply establishes a minor place restriction on an extremely broad category of communications with unwilling listeners. Instead of drawing distinctions based on the subject that the approaching speaker may wish to address, the statute applies equally to used car salesmen, animal rights activists, fundraisers, environmentalists, and missionaries.

Id. at 723. Similarly, Gilbert's Sign Code places no restrictions on the particular viewpoints of any person or entity that seeks to erect a Temporary Directional Sign and the exemption applies equally to all.

Furthermore, in *Hill,* the Supreme Court explained why a statute, which only restricted certain types of speech-related conduct,[12] is properly

---

[12] Justice Stevens' opinion for the court begins by stating:

> At issue is the constitutionality of a 1993 Colorado statute that regulates speech-related conduct within 100 feet of the entrance to any health care

considered content neutral. The Court reiterates that "[t]he principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Id.* at 719 (quoting *Ward*, 491 U.S. at 791). It then offers three reasons for why the statute is content neutral:

> First, it is not a "regulation of speech." Rather, it is a regulation of the places where some speech may occur. Second, it was not adopted "because of disagreement with the message it conveys." Third, the State's interests in protecting access and privacy, and providing the police with clear guidelines, are unrelated to the content of the demonstrators' speech. As we have repeatedly explained, government regulation of expressive activity is "content neutral" if it is justified without reference to the content of regulated speech.

530 U.S. at 719–20. The Court further stated that it

---

facility. The specific section of the statute that is challenged, Colo. Rev. Stat. § 18-9-122(3) (1999), makes it unlawful within the regulated areas for any person to "knowingly approach" within eight feet of another person, without that person's consent, "for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person . . ."

530 U.S. at 707.

had "never held, or suggested, that it is improper to look at the content of an oral or written statement in order to determine whether a rule of law applies to a course of conduct." *Id.* at 721. The Supreme Court also distinguished its opinion in *Carey v. Brown*, 447 U.S. 455 (1980), noting that the Colorado statute "places no restrictions on – and clearly does not prohibit – either a particular viewpoint or any subject matter that may be discussed by a speaker." *Id.* at 723. Finally, in response to Justice Scalia's concern that content-based legislation can be used for invidious thought-control purposes, the Court stated: "[b]ut a statute that restricts certain categories of speech only lends itself to invidious use if there is a significant number of communications, raising the same problem that the statute was enacted to solve, that fall outside the statute's scope, while others fall inside." *Id.*

Gilbert's regulation of Temporary Directional Signs is content-neutral as that term is defined by the Supreme Court in *Hill*. Gilbert did not adopt its regulation of speech because it disagreed with the message conveyed. Rather, it exempted from the permit requirement all directional signs regardless of their content.[13] The Code is "a regulation of the

---

[13] An argument can be made that Gilbert's exemption of temporary signs from its permit requirements and limitations on such temporary signs may be construed as disapproval of temporary signs generally. However, this is not the type of "disagreement with the message" proscribed by the Supreme Court in *Hill*, 530 U.S. at 719. Obviously, any legislation regulating speech is based on a view that the speech should not be unlimited. This does not render the legislation unconstitutional. In *Hill*, the Supreme Court explained:

places where some speech may occur," and was not adopted "because of any disagreement with the message it conveys." *Id.* at 719. Also, Gilbert's interests in regulation temporary signs are unrelated to the content of the sign. Moreover, there is no danger of the regulation being used for invidious thought-control purposes as the Sign Code does not purport to regulate the content of Temporary Directional Signs. Because Gilbert's Sign Code places no restrictions on the particular viewpoints of any person or entity that seeks to erect a Temporary Directional Sign and the exemption applies to all, it is content-neutral as that term has been defined by the Supreme Court.[14]

> In this case, it is not disputed that the regulation affects protected speech activity; the question is thus whether it is a "reasonable restrictio[n] on the time, place, or manner of protected speech." *Ward*, 491 U.S., at 791, 109 S. Ct. 2746. Here, the comprehensiveness of the statute is a virtue, not a vice, because it is evidence against there being a discriminatory governmental motive. As Justice Jackson observed, "there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally." *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 112, 69 S. Ct. 463, 93 L. Ed. 533 (1949) (concurring opinion).

530 U.S. at 731. Here, the limitations on Temporary Directional Signs apply equally to all organizations, regardless of their wealth or pedigree.

[14] Our conclusion is consistent with the perspective of the Sixth Circuit in *Phelps-Roper v. City of Manchester*, 697 F.3d 678, 683 (6th Cir. 2012) (upholding a city regulation of

D. Good News has not shown that the Sign Code's Different Treatment of Different Types of Noncommercial Speech is Unconstitutional.

Although it is conceivable, as the dissent posits, that different exemptions for noncommercial speech might improperly restrict speech, that concern is not presented here. First, as explained, the Temporary Directional Sign exemption is a content neutral. Second, the Temporary Directional Sign exemption is not in competition with other exemptions from the permit requirement. This is not a situation where there are a limited number of billboards or maximum number of temporary signs that may be placed in the public right-of-way. Nor does the erection of temporary directional signs in any way limit any other person's rights to erect political, ideological, or other signs. Accordingly, as long as the Temporary Directional Signs exemption – which is the exemption that was applied to Good News' signs and that Good News challenges – is content neutral and reasonable in relationship to its purpose — providing direction to temporary events – its constitutionality is not affected by the fact that the exemptions for Political Signs or Ideological Signs are different.

The cases cited by the dissent do question distinctions among different categories of non-commercial speech, but none concerned instances in which the types of non-commercial speech were

---

picketing at funerals and burials as a legitimate time, place, and manner regulation consistent with the First Amendment).

unrelated, and all of the cases have been refined by more recent Supreme Court opinions. In *Police Department of Chicago v. Mosley*, 408 U.S. 92, 96 (1972), the Supreme Court struck down an ordinance as unconstitutional because it sought to distinguish between peaceful labor picketing and other peaceful picketing. Similarly, in *Carey*, 447 U.S. 455 (1980), the Supreme Court struck down an ordinance that sought to distinguish between picketing at a residence from picketing at a place of employment. In *Metromedia*, 453 U.S. 490, the Court, in a fractured opinion, considered an ordinance that differentiated between commercial and non-commercial billboards, but also suggested that the city had less leeway to distinguish between types of non-commercial speech than between types of commercial speech. *Id.* at 514–15. These cases concerned related and competing forms of speech.[15] *Id.* at 514–15. In contrast, Gilbert's Temporary Directional Signs exemption neither restricts nor competes with a person's or entity's ability to take advantage of the exemptions for political, ideological, or other types of temporary signs.

Critically, as noted, over the last thirty years, the Supreme Court has refined the concerns set forth in Justice White's plurality opinion in *Metromedia*. Most notably, in *Hill*, the Supreme Court upheld a statute that clearly distinguished between types of noncommercial speech. The statute prohibited the

---

[15] Similarly, our opinion in *National Advertising*, 861 F.2d 246, and *Desert Outdoor Advertising*, 103 F.3d 814, held that cities could not impose greater restrictions on non-commercial billboards than commercial billboards and could not regulate non-commercial billboards based on content.

noncommercial speech of "approaching" an individual "for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education or counseling with such other person." 530 U.S. at 707. No other form of noncommercial speech was regulated. Nonetheless, the Supreme Court upheld the ordinance. Similarly, in *Ward*, the Supreme Court stated that a "regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." 491 U.S. at 791. Thus, the Sign Code's different provisions for Political, Ideological and Temporary Directional Signs is not in itself unconstitutional.

Although Good News voices some objections to the size, location, and duration limitations on its signs, Good News does not assert that the restrictions actually interfere with the purpose of the signs: providing directions to Good News' services. Moreover, courts have generally deferred to municipal decisions concerning the actual limitations on the sizes and shapes of signs. *See Ward*, 491 U.S. at 800 ("So long as the means chosen are not substantially broader than necessary to achieve the government's interest, however, the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative."); *Foti*, 146 F.3d at 641 (noting that the "restrictions on the size and number of picket signs are reasonable legislative judgments in light of the City's concerns for traffic safety"); *City of Orange*, 861 F.2d at 249 ("Under *Metromedia*, the City's

interests in traffic safety and aesthetics are sufficient to justify continued content-neutral regulation of the noncommunicative aspects of billboards, such as size, spacing and design.").

E. The Temporary Directional Signs Exemption is Narrowly Tailored to Serve Significant Governmental Interests

The Supreme Court has explained that "[c]ontent-neutral regulations do not pose the same inherent dangers to free expression that content-based regulations do, and thus are subject to a less rigorous analysis, which affords the Government latitude in designing a regulatory solution." *Turner Broadcasting System, Inc. v. F.C.C.*, 520 U.S. 180, 213 (1997) (internal quotation marks and citation omitted).[16] Nonetheless, a content-neutral, reasonable time, place and manner restriction must also be narrowly tailored to serve a significant governmental interest and leave open ample alternative channels of communication. *G.K. Ltd.*, 436 F.3d at 1071.[17]

---

[16] The Court further stated, citing *Ward*, 491 U.S. at 799, and *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 662 (1994), that "[u]nder intermediate scrutiny, the Government may employ the means of its choosing so long as the ... regulation promotes a substantial governmental interest that would be achieved less effectively absent the regulation, and does not burden substantially more speech than is necessary to further that interest." (internal quotation marks omitted).

[17] To the extent that our opinion in *Seattle Affiliate of Oct. 22nd Coalition to Stop Police Brutality v. City of Seattle*, 550

There is no real question that Gilbert's interests in safety and aesthetics are significant. *See One World One Family Now v. City & Cnty. of Honolulu*, 76 F.3d 1009, 1013 (9th Cir. 1996) (holding that cities have substantial interests in protecting the aesthetic appearance of their communities and in assuring the safe and convenient circulation on their streets); *see also Metromedia*, 453 U.S. at 507–08 ("Nor can there be substantial doubt that the twin goals that the ordinance seeks to further – traffic safety and the appearance of the city – are substantial governmental goals."). Good News argues only that such interests are not "sufficiently compelling to satisfy a content-based sign code," but we find that the Sign Code does not impose any content-based restriction.

Good News contends that the Sign Code is not narrowly tailored because all temporary signs placed within the public right-of-way implicate safety and aesthetic concerns, but Temporary Directional Signs are more severely limited than Political and Ideological Signs.

Political and Ideological Signs may infringe on Gilbert's interests to a greater extent than Temporary Directional Signs, but for a number of reasons this is permissible. First, unlike political,

---

F.3d 788, 791 (9th Cir. 2008), further requires that an ordinance not delegate overly broad discretion to a government official, this condition is satisfied. A person does not need any approval to erect a temporary sign. Rather, Gilbert will only seek the removal of a sign if its size or duration violates the Sign Code's relatively clear time, place, and manner limitations.

ideological and religious speech which are clearly entitled to First Amendment protection, there does not appear to be a constitutional right to an exemption for Temporary Directional Signs. If Good News has no constitutional right to erect Temporary Directional Signs, how can it suffer a cognizable harm when Gilbert creates an exemption facilitating the display of such signs?

Second, each exemption reflects a balance between Gilbert's interests and the constitutional interests of the type of sign covered. With the recent amendment to the Sign Code, there are no longer any differences as to where temporary signs may be located. The differences as to duration are based on the natures of the types of speech involved. Thus, under Arizona law political signs are allowed for an extended period of time before an election. Ideological signs, not being tied to any event, have no time limit. However, the purpose of a Temporary Directional Sign inherently contemplates a limit on duration.

Third, as noted, the exemptions are not in competition. The exemptions are not competing for limited space and the erection of one type of temporary sign does not preclude the placement of another. Accordingly, each exemption may be evaluated on its own merits.

Fourth, there is no showing that the restrictions on Temporary Directional Signs interfere with their purpose: directing interested individuals to temporary events. Good News does not allege that the public cannot see its signs or that the size limit

is too small to allow it to adequately provide directions.

Finally, as also noted, courts generally defer to a city's determinations of size and duration. *See Ward,* 491 U.S. at 800; *Foti,* 146 F.3d at 641. Here, the restrictions on Temporary Directional Signs are reasonable. There are no limits on the number of events that a person or entity may hold, and no limit on the number of signs that may be erected (other than no more than four on any single piece of property). Also, the 12-hour limitation seems reasonable as a person is unlikely to seek directions to an event more than 12 hours before the event.

We conclude that these considerations refute Good News' arguments that to be narrowly tailored restrictions on types of noncommercial speech must be uniform or vary only to the extent that the type of speech affects a town's interests. Our opinions in *G.K. Ltd.* and *Reed* support, if not compel, our conclusion. In *G.K. Ltd.*, we held a total ban on changeable pole signs was narrowly tailored because pole signs could reasonably be perceived as aesthetically harmful and distracting to travelers, even though this is also true of unchanged pole signs. *See* 436 F.3d at 1074. In *Reed,* we determined that "[t]he restrictions on time, place and manner imposed by on the display of [signs] would indeed appear to 'actually advance' the aesthetic and safety interests by limiting the size duration and proliferation of signs." 587 F.3d at 980. Our determination in *Reed* that the Sign Code is narrowly tailored, if not controlling, remains sound.

In sum, (a) Gilbert was not required to create an exemption for Temporary Directional Signs, (b) the restrictions on directional signs are rationally related to the purpose of the directional signs, and (c) the restrictions are reasonably designed to promote Gilbert's interests in aesthetics and safety. True, the number of temporary signs might be substantially reduced if there were not exemptions for political and ideological signs, but those signs raise different legal rights and interests that Gilbert has to respect. Moreover, there need only be a reasonable fit between the Gilbert's interest and the regulations. *See Hill*, 530 U.S. at 726 (stating that "when a content-neutral regulation does not entirely foreclose any means of communication, it may satisfy the tailoring requirement even though it is not the least restrictive or least intrusive means of serving the statutory goal"); *see also Bd. of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989) ("What our decisions require is a 'fit' between the legislature's ends and the means chosen to accomplish those ends – a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served.") (internal quotation marks and citation omitted). At least between elections, the Sign Code may well limit the number of temporary signs in Gilbert without unreasonably limiting anyone's speech, and thus the Sign Code serves significant governmental interests.

Finally, the Sign Code leaves open ample alternate means of communication. Assuming that Good News events are eligible for the exemption, it may erect as many temporary signs as it wants

twelve hours before each scheduled event. The Sign Code does not regulate any of the many other ways in which Good News can "go and make disciples of all nations." Indeed, there is no suggestion that Good News' tenets require that it or its members erect temporary directional signs. Thus, the Sign Code's restrictions do not require that the members of Good News violate any cardinal principle of their faith, *see Sherbert v. Verner,* 374 U.S. 398, 406 (1963), and do not limit the many other ways the members may advertise their services and attract individuals.

F. Good News' Other Challenges do not Merit Relief

1. To prevail on its claims of violation of its members' right to the free exercise of religion under the Constitution and under Arizona's Free Exercise of Religion Act, Ariz. Rev. St. § 41-1493, Good News must show that "the government action substantially burdens the exercise of religious beliefs." *State v. Hardesty,* 222 Ariz. 363, 366 (Ariz. 2009). Good News' free exercise claim fails because the Sign Code's restrictions on the size and duration of Temporary Directional Signs is a generally applicable law, and it does not substantially interfere with any of Good News' tenets. The Supreme Court has held that religion may not exempt a person from complying with neutral laws. *See Employment Div., Dep't of Human Res. of Or. v. Smith,* 494 U.S. 872, 878–79 (1990) (holding that "the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes)

conduct that his religion prescribes (or proscribes)." (internal quotation marks and citation omitted)). Furthermore, while Good News' members may be obligated to spread their message and advertise their events, there is no suggestion that Good News' tenets require that they do so in any particular way. Accordingly, we agree with the district court that the Sign Code's restrictions on Temporary Directional Signs do not constitute a substantial burden on Good News' free exercise rights.

2. We also agree with the district court that the Sign Code is not vague or overbroad. The Supreme Court noted in *Ward*, 491 U.S. at 794, that "perfect clarity and precise guidance have never been required even of regulations that restrict express activity." Good News' claim of vagueness is based on an alleged lack of definitions for signs that arguably meet the requirements of more than one temporary sign exemption. However, Gilbert officials claim that they have yet to see such a sign and Good News does not argue that its signs meet the requirements of more than one exemption.[18] In addition, in *Reed*, 587 F.3d at 974, we held that Good News' mounted only an as-applied challenge to the Sign Code. This is law

---

[18] Moreover, the procedures for enforcing the Sign Code respect the rights of a speaker. If an official noted a temporary sign that fits within two exemptions, he or she would check with the city manager and Gilbert would presumably accord the sign the broader exemption. Thus, a political sign with directions would be allowed the duration limit for political signs. Similarly, a religious sign that also included directions might qualify as an ideological sign. Good News has never asserted that its temporary directional signs should be treated as ideological signs.

of the case, and is not really challenged by Good News.

3. Good News' assertion that the Sign Code violates its right to equal protection of law is basically a revision of its argument that Gilbert cannot treat different types of noncommercial speech differently. Clothed in the garb of equal protection the argument still is not persuasive. The Sign Code does not make any distinctions based on religion. Rather, the Temporary Directional Signs exemption is available to all noncommercial entities. Because we conclude that the Sign Code is not unconstitutional just because it differentiates between types of noncommercial signs, Good News' equal protection argument depends on it establishing a cognizable class of noncommercial entities wishing to erect temporary directional signs to their events whose interests may be compared to some other class. Good News has failed to identify such entities.

G. Any Challenge Good News May Advance to the Amended Sign Code Should Be Initially Litigated in the District Court

Although the amendment to the Sign Code does not moot this appeal, we need not, and do not, determine the merits of the amendment. Unlike the situation before the Supreme Court in *Northeastern Florida,* 508 U.S. 656, here the amendment arguably increases rather than decreases the barriers to Good News erecting temporary directional signs. Also, unlike the holding in *Northeastern Florida,* we have determined that Good News has not shown that the

other restrictions imposed by the Sign Code violate its constitutional rights. However, the added restriction to the Sign Code – hat Temporary Directional Signs are only exempt from the permit requirement if they concern events that take place within the Town of Gilbert – is different in nature from the time, place, and manner restrictions that Good News previously challenged. Moreover, even if we assume that Good News will challenge the new restriction, we do not know what constitutional and legal arguments Good News will present in challenging the restriction, or what defenses Gilbert will proffer. Accordingly, any challenge Good News may have to the amendment limiting the Temporary Directional Sign exemption to events in the Town of Gilbert should be raised in the first instance in the district court. As we affirm the district court's grant of summary judgment for Gilbert, we leave it to the district court to determine whether Good News may seek to amend its existing complaint or should file a new complaint.

III

In *Reed,* 587 F.3d 966, and *G.K. Ltd.,* 436 F.3d 1064, we held that distinctions based on the speaker or the event are permissible where there is no discrimination among similar events or speakers. In *Hill,* 530 U.S. at 703, the Supreme Court indicated that not all types of noncommercial speech need be treated the same. *See also Ward,* 491 U.S. at 791 (noting that a "regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others."). Applying this

case law to the Town of Gilbert's Sign Code's treatment of different types of noncommercial speech, we conclude that the treatment is content-neutral. That is to say, each exemption allowing for the erection of temporary signs and its restrictions are based on objective factors relevant to the creation of the specific exemption and do not otherwise consider the substance of a sign. We further conclude that the exemptions are narrowly tailored because they serve significant governmental interests and leave open ample alternative channels of communication. We also conclude that the Sign Code does not violate Good News' (or its members') right to the free exercise of religion or right to equal protection of law, and is not unconstitutionally vague or overbroad. The district court's grant of summary judgment in favor of the Town of Gilbert is **AFFIRMED.**

WATFORD, Circuit Judge, dissenting:

I agree with the majority that the post-judgment amendments to the Town of Gilbert's sign ordinance do not render this appeal moot. But I disagree with the majority's conclusion that the sign ordinance is constitutional.

When this case first came before us, we evaluated § 4.402(P) of Gilbert's sign ordinance in isolation. *See Reed v. Town of Gilbert*, 587 F.3d 966, 976–79 (9th Cir. 2009) (*Reed I*). That provision specifies the restrictions applicable to "temporary directional signs relating to a qualifying event," such as the signs plaintiff Good News Community Church

seeks to display inviting people to attend its Sunday morning services.[1] We held that, with respect to the temporary directional signs it covers, § 4.402(P) is content-neutral. *Id.* at 979. We reached that conclusion because, considered on its own, § 4.402(P) "does not single out certain content for differential treatment, and in enforcing the provision an officer must merely note the content-neutral elements of who is speaking through the sign and whether an event is occurring." *Id.*

What we did not decide in *Reed I* is whether § 4.402(P) is impermissibly content-based when viewed in relation to the other provisions of Gilbert's sign ordinance. In particular, we noted that the district court had not addressed plaintiffs' argument that "the ordinance unfairly discriminates among forms of noncommercial speech," *id.* at 971, by granting more favorable treatment to signs that Gilbert categorizes as "political" and "ideological." *Id.* at 983. We therefore remanded the case for resolution of plaintiffs' "First Amendment and Equal Protection claims that the Sign Code is unconstitutional in favoring some noncommercial speech over other noncommercial speech." *Id.*

The Fourteenth Amendment's Equal Protection Clause and the First Amendment's Free Speech Clause prohibit the government from favoring

---

[1] "Temporary directional signs relating to a qualifying event" are defined as signs "intended to direct pedestrians, motorists, and other passersby to a 'qualifying event.' A 'qualifying event' is any assembly, gathering, activity, or meeting sponsored, arranged, or promoted by a religious, charitable, community service, educational, or other similar non-profit organization."

certain categories of non-commercial speech over others based solely on the content of the message being conveyed. *See Carey v. Brown*, 447 U.S. 455, 459–61 (1980); *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 96 (1972). When regulating speech in a public forum, the government may draw distinctions among different categories of non-commercial speech only if those distinctions are justified by some non-communicative aspect of the speech involved. *See Carey*, 447 U.S. at 465; *Mosley*, 408 U.S. at 100. For example, a State may not exempt labor picketing from a general ban on picketing in front of homes (enacted to protect residential privacy), unless it can show that labor picketing is inherently less disruptive of residential privacy than picketing on other subjects. *Carey*, 447 U.S. at 465. The reason is simple: Within the realm of noncommercial speech, the government may not decide that speech on certain subjects is more (or less) valuable—and therefore more (or less) deserving of First Amendment protection—than speech on other subjects. *Id.* at 466; *see Mosley*, 408 U.S. at 96.

The Supreme Court relied on this general principle to strike down a municipal sign ordinance in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981). A plurality of the Court invalidated San Diego's ordinance banning most non-commercial billboards on the ground that the ordinance impermissibly granted exemptions for billboards bearing non-commercial speech on favored subjects, such as political campaign messages. *Id.* at 514 (plurality opinion). The plurality held that, although cities "may distinguish between the relative value of different categories of commercial speech," they do

not have the same freedom in the realm of non-commercial speech "to evaluate the strength of, or distinguish between, various communicative interests." *Id.* (citing *Carey*, 447 U.S. at 462; *Mosley*, 408 U.S. at 96). San Diego could not identify any non-communicative aspect of the speech at issue to justify the distinctions it had drawn. It failed to show, for example, that the non-commercial billboards it banned had any greater effect on the city's asserted interests in promoting traffic safety and aesthetics than the non-commercial billboards it permitted. *See id.* at 513; *see also Desert Outdoor Adver., Inc. v. City of Moreno Valley*, 103 F.3d 814, 820 (9th Cir. 1996) (applying *Metromedia* plurality's holding); *Nat'l Adver. Co. v. City of Orange*, 861 F.2d 246, 248–49 (9th Cir. 1988) (same).

Contrary to the majority's suggestion, *Hill v. Colorado*, 530 U.S. 703 (2000), did not modify or refine the core principle underlying *Mosley*, *Carey*, and *Metromedia*. The statute at issue in *Hill* prohibited, within certain designated areas, approaching within eight feet of another for the purpose of engaging in oral protest, education, or counseling. *Id.* at 707. The Court held that the statute was content-neutral because it regulated a particular mode of communication—approaching within eight feet of another to engage in oral protest, education, or counseling—without regard to the subject of the speaker's message. *Id.* at 720–24. As the Court stressed, "Instead of drawing distinctions based on the subject that the approaching speaker may wish to address, the statute applies equally to used car salesmen, animal rights activists, fundraisers, environmentalists, and missionaries."

Id. at 723. (As explained below, the ordinance at issue in this case does draw distinctions based on the subject the speaker wishes to address.) Thus, rather than distinguishing among different categories of non-commercial speech based on the message being conveyed, the Colorado statute prohibited *all* non-commercial speech expressed through a particular mode of communication—a fact that rendered *Carey* "easily distinguishable." *Id.*

Gilbert's sign ordinance violates the First and Fourteenth Amendments by drawing content-based distinctions among different categories of non-commercial speech. The most glaring illustration is the ordinance's favorable treatment of "political" and "ideological" signs relative to the treatment accorded the non-commercial signs plaintiffs seek to display. Under the ordinance, plaintiffs' temporary directional signs may not exceed six square feet in size and may not be displayed more than 12 hours before or one hour after the relevant event—here, Sunday morning church services. (Given the 9:00 a.m. start time of Good News's church services, this durational restriction limits the display of plaintiffs' signs to periods when it is virtually always dark.) In contrast, "political" signs—defined as "[a] temporary sign which supports candidates for office or urges action on any other matter on the ballot of primary, general and special elections relating to any national, state or local election"—may be up to 32 square feet in size and may be displayed any time prior to an election and removed within 10 days after the election. "Ideological" signs—defined as "a sign communicating a message or ideas for non-commercial purposes" that is not a construction,

directional, political, or garage sale sign—may be up to 20 square feet in size and are not subject to any durational limits at all.[2]

Gilbert's sign ordinance plainly favors certain categories of non-commercial speech (political and ideological signs) over others (signs promoting events sponsored by non-profit organizations) based solely on the content of the message being conveyed. These are not content-neutral "speaker" and "event" based distinctions, like those we approved in *G.K. Ltd. Travel v. City of Lake Oswego*, 436 F.3d 1064, 1076–78 (9th Cir. 2006), and in *Reed I*, 587 F.3d at 977–78, when we reviewed § 4.402(P) standing alone. Determining whether a particular sign will be regulated as a "political" sign as opposed to an "ideological" sign or a "temporary directional sign relating to a qualifying event" turns entirely on the content of the message displayed on the sign. *Cf. G.K. Ltd.*, 436 F.3d at 1078 (speaker and event based distinctions were content-neutral because they applied "without regard for the actual substance of the message" and "regardless of content").

The content-based distinctions Gilbert has

---

[2] Until recently, Gilbert's sign ordinance contained an even more blatantly discriminatory distinction: Political and ideological signs could be displayed in the public right of way but "temporary directional signs relating to a qualifying event" could not. After the parties filed their briefs in this court, Gilbert removed this restriction but replaced it with an equally suspect one. Under the amended ordinance, "temporary directional signs relating to a qualifying event" may not be displayed *anywhere* in Gilbert unless the "qualifying event" takes place within the town's borders.

drawn are impermissible unless it can identify some non-communicative aspect of the signs at issue to justify this differential treatment. *See Metromedia*, 453 U.S. at 513; *Carey*, 447 U.S. at 465; *Mosley*, 408 U.S. at 100. Gilbert has merely offered, as support for the sign ordinance as a whole, its interest in enhancing traffic safety and aesthetics. Traffic safety and aesthetics are certainly important interests. But to sustain the distinctions it has drawn, Gilbert must explain why (for example) a 20-square-foot sign displayed indefinitely at a particular location poses an acceptable threat to traffic safety and aesthetics if it bears an ideological message, but would pose an unacceptable threat if the sign's message instead invited people to attend Sunday church services.

Gilbert has not offered any such explanation, and I doubt it could come up with one if it tried. What we are left with, then, is Gilbert's apparent determination that "ideological" and "political" speech is categorically more valuable, and therefore entitled to greater protection from regulation, than speech promoting events sponsored by non-profit organizations. That is precisely the value judgment that the First and Fourteenth Amendments forbid Gilbert to make. *See Metromedia*, 453 U.S. at 514; *Carey*, 447 U.S. at 466; *Mosley*, 408 U.S. at 96.

Nothing we said in *Reed I* is inconsistent with this conclusion. There we held only that § 4.402(P), viewed in isolation, is a valid content-neutral time, place, and manner regulation. *Reed I*, 587 F.3d at 979–82. We did not decide, and instead remanded for the district court to decide, whether Gilbert's sign ordinance draws content-based distinctions by

"favoring some noncommercial speech over other noncommercial speech." *Id.* at 983. In doing so, we mentioned as potentially relevant *National Advertising Co. v. City of Orange*, 861 F.2d 246 (9th Cir.1988), where (we noted in *Reed I*) we invalidated a municipal sign ordinance that "made content-based distinctions among categories of noncommercial speech." *Reed I*, 587 F.3d at 982. Thus, when we said in *Reed I* that *§ 4.402(P)* "does not single out certain content for differential treatment," *id.* at 979, we obviously did not decide whether *the sign ordinance as a whole* singles out certain content for differential treatment. Otherwise, our remand to the district court would have been entirely unnecessary.

For the reasons given above, I would hold that the regulatory distinctions Gilbert has drawn among different categories of non-commercial speech are unconstitutional, and I would remand for the district court to determine whether those provisions of Gilbert's sign ordinance are severable. I respectfully dissent from the majority's contrary holding.

Filed: February 11, 2011

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Pastor Clyde Reed; Good News Presbyterian Church,	)	Case No. CV 07-0522-PHX-SRB
Plaintiffs,	)	**ORDER**
vs.	)	
Town of Gilbert; Adam Adams, in his official capacity as Code Compliance Manager,	)	
Defendants.	)	

At issue are Plaintiffs Pastor Clyde Reed and Good News Presbyterian Church's Motion for Summary Judgment ("Pls.' MSJ") (Doc. 100) and Defendants the Town of Gilbert ("the Town") and Adam Adams' Cross-Motion for Summary Judgment ("Defs.' MSJ") (Doc. 97). The Court also resolves Defendants' Motion for Leave to File Objection to Admission of Evidence ("Defs.' Objection") (Doc. 111) at this time.

I. BACKGROUND

The facts of this case were set out in this Court's Order of September 30, 2008 (the "PI Order"), in

which the Court denied Plaintiffs' Second Motion for Preliminary Injunction. (*See* Doc. 43, PI Order at 1-7.) The pertinent details are summarized here.

A. Factual and Procedural History

Plaintiff Clyde Reed is the Pastor of Plaintiff Good News Community Church ("Good News").[1] (Pls.' Statement of Undisputed Facts ("PSOF") ¶ 8.) For approximately five years prior to the filing of Plaintiffs' Complaint in March 2007, Good News met at Coronado Elementary School in Gilbert, Arizona. (*Id.* ¶ 22.) Good News presently rents space at an elementary school in Chandler, Arizona, which borders Gilbert, Arizona, for its weekly services. (DSOF ¶¶ 3, 5; PSOF ¶ 23.) Good News has about 25-30 adult members, as well as 4-10 children. (DSOF ¶ 4.) As part of their religious beliefs, members of Good News "reach out to the community to meet together on a regular basis." (PSOF ¶¶ 12-15.)

"A primary way in which the community may learn about Plaintiffs' services is through the signs that are placed announcing the time and location of the services." (PSOF ¶ 18.) "For a time, the Church

---

[1] Mr. Reed testified in his deposition that the name of the church has "vacillated" between Good News Presbyterian Church and Good News Community Church. (Defs.' Separate Statement of Facts in Supp. of Defs.' MSJ ("DSOF"), Ex. A, Dep. of Clyde Reed 5:10-16.) Although the electronic docket for this case uses Good News Presbyterian Church, Plaintiffs in their briefing refer to the church as Good News Community Church, and the Court therefore uses "Community" rather than "Presbyterian."

was placing about 17 signs in the areas surrounding" the meeting place. (*Id.* ¶ 24.) On September 17, 2005, Good News received an advisory notice from the Town's Code Compliance Department, stating that Good News was in violation of § 4.402(P) of the Town's Sign Code because the signs were displayed outside the statutorily limited time period of two hours before, during, and one hour after the advertised event. (*Id.* ¶ 26.) On January 8, 2008, the Town passed amendments to its Sign Code.[2] (Joint Statement of Facts in Supp. of Cross-Mots. for Summ. J. ("JSOF") ¶ 2.) Plaintiffs subsequently filed a First Amended Verified Complaint, in which they allege that the amended Sign Code, in particular § 4.402(P), still violates their rights, as guaranteed by the United States and Arizona Constitutions and the Arizona Free Exercise of Religion Act ("FERA").[3] (*See* Doc. 32, 1st Am. Verified Compl. ¶¶ 83-138.)

On March 24, 2008, the Court heard oral argument on Plaintiffs' Second Motion for Preliminary Injunction. In the PI Order, which was filed on September 30, 2008, the Court denied preliminary injunctive relief, finding that Plaintiffs had not demonstrated a likelihood of success on the merits of their claims. (PI Order at 16-17.) Plaintiffs appealed the Court's decision regarding preliminary injunctive relief to the Ninth Circuit Court of Appeals, which in turn issued a decision filed on December 14, 2009. *See Reed v. Town of Gilbert,*

---

[2] All further references in this Order to the Sign Code are to the amended Sign Code.

[3] The parties refer to FERA as Arizona's "Religious Freedom Restoration Act."

Ariz., 587 F.3d 966 (9th Cir. 2009). The Court of Appeals largely affirmed this Court's conclusions in the PI Order. *Id.* at 970-71. However, the Court of Appeals remanded this matter for consideration of one issue: whether the Sign Code "unfairly discriminates among forms of noncommercial speech." *Id.* at 971. At a status conference held after the mandate of the Court of Appeals issued, the parties stated that their intention was to resolve all remaining issues on summary judgment, rather than renewing a motion for a preliminary injunction or saving some issues for trial. (*See* Status Conference Hr'g Tr. 3:15-5:2, Jan. 11, 2010.)[4] Therefore, this Order is fully case dispositive. The Court heard oral argument on the parties' Cross-Motions for Summary Judgment on November 22, 2010. (*See* Doc. 116, Minute Entry.)

B. The Sign Code

The Town of Gilbert Land Development Code, Division 4, General Regulations, Article 4.4, Sign Regulations, controls the posting of signs within the Town of Gilbert. (JSOF, Ex. 1, Sign Code (henceforth, the "Sign Code").) Section 4.401(A) outlines the purposes of the Sign Code, namely, to "assure proper and efficient expression through visual communications involving signs compatible with the character and environment of the Town; to eliminate confusing, distracting, and unsafe signs;

---

[4] The parties again confirmed at oral argument on these Motions that there were no issues for trial and that the case was to be decided on the Cross-Motions for Summary Judgment. (*See* Motion Hr'g Tr. 3:15-20, 26:23-27-2, Nov. 22, 2010.)

and to enhance the visual environment of the Town of Gilbert." Section 4.401(A) also lists the reasons why Defendants believe that the regulation of signs is necessary and in the public interest.[5]

---

[5] Section 4.401(A) provides:

> The regulation of signs within the Town of Gilbert is necessary and in the public interest for the following reasons:
>
> 1. To promote and aid the public and private sectors in the identification, location, and advertisement of goods and services.
> 2. To preserve the beauty and the unique character of the Town of Gilbert and to protect the Town against visual blight.
> 3. To protect property values within the Town of Gilbert by assuring the compatibility of surrounding land uses.
> 4. To promote general safety and protect the general public from damage or injury caused by, or partially attributed to, the distractions, hazards, and obstructions which result from improperly designed or located signs.
> 5. To promote the general welfare and to provide a pleasing environmental setting and community appearance which are vital to the continued economic development of the Town.
> 6. To make signs compatible with overall Town design objectives which are important in attracting new residents and business to the community.
> 7. To make signs readable to the user in a clear, unambiguous, and concise manner.
> 8. To ensure signs are clear and compatible with the planned character of the adjacent architecture and neighborhoods, and to provide the essential identity of, and direction to facilities in the community.

Under § 4.402(A), no person may "construct, install, attach, place, paint, alter, relocate, or otherwise maintain any sign in the Town without first obtaining a sign permit" unless the sign is one exempted under § 4.402(D). Section 4.402(D) lists nineteen different exceptions: types of signs that are allowed without a permit. These include, among others, § 4.402(P), "Temporary Directional Signs Relating to a Qualifying Event; " ("Qualifying Event Signs") § 4.402(I), "Political Signs;" and § 4.402(J), "Ideological Signs." (*See* Sign Code at 2-3.)

Section 4.402(P), concerning Qualifying Event Signs, provides, in relevant part:

> Temporary Directional Signs Relating to a Qualifying Event shall be permitted subject to the following regulations:
>
> 1. *Size*. Signs shall be no greater than 6 feet in height and 6 square feet in area.
>
> 2. *Number*. No more than 4 signs shall be displayed on a single property at any one time.
>
> 3. *Display*. Signs shall only be displayed up to 12 hours before, during, and 1 hour after the qualifying event ends. The person who installed the signs shall be responsible for removal. If the person installing the signs is unknown, the property owner shall be responsible.

4. *Location.* Temporary Directional Signs Relating to a Qualifying Event may be located off-site and shall be placed at grade level. Signs shall be placed only with the permission of the owner of the property on which they are placed.

5. *Prohibited Locations.* Temporary Directional Signs Relating to a Qualifying Event shall not be located:

    a. In the public right-of-way.

    b. On fences, boulders, planters, other signs, vehicles, utility facilities, or any structure.

The Sign Code's Glossary of General Terms defines "Temporary Directional Signs Relating to a Qualifying Event" as "a temporary sign intended to direct pedestrians, motorists, and other passersby to a 'qualifying event'" and a "Qualifying Event" as "any assembly, gathering, activity, or meeting sponsored, arranged, or promoted by a religious, charitable, community service, educational, or other similar non-profit organization." (JSOF, Ex. B at 23). A "Political Sign" is defined as "[a] temporary sign which supports candidates for office or urges action on any other matter on the ballot of primary, general and special elections relating to any national, state or local election." (*Id.* at 21-22.) An "Ideological Sign" is "[a] sign communicating a message or ideas for non-commercial purposes that is not a construction sign, directional sign, temporary directional sign relating to a qualifying event, political sign, garage

sale sign, or a sign owned or required by a governmental agency." (*Id.* at 22.)

Plaintiffs also highlight another type of sign: "Homeowners Association Facilities Temporary Signs," ("HOA Temporary Event Signs") governed by § 4.406(C)(4). Section 4.406(C)(4), provides, in pertinent part:

> Temporary Signs for *Homeowners Association Facilities* shall comply with the following regulations:
>
> a. Applicability. Banners and Directional Signs for *Homeowners Association Facilities* are permitted that display information concerning seasonal or temporary events occurring in the development.
>
> b. Sign Area and Location. A maximum of 80 square feet of sign area is permitted within the limits of the residential community.
>
> c. Installation and Removal. Signs shall be installed no earlier than 30 days prior to the date of an event and shall be removed within 48 hours of completion of the event.
>
> e. Placement. The regulations of Section 4.402: General Sign Regulations and

Section 4.403.C: Placement of Signs shall apply.

II. LEGAL STANDARDS AND ANALYSIS

A. Summary Judgment Standard

The standard for summary judgment is set forth in Rule 56(c) of the Federal Rules of Civil Procedure. Under Rule 56, summary judgment is properly granted when: (1) no genuine issues of material fact remain; and (2) after viewing the evidence most favorably to the non-moving party, the movant is clearly entitled to prevail as a matter of law. Fed. R. Civ. P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Eisenberg v. Ins. Co. of N. Am.*, 815 F.2d 1285, 1288-89 (9th Cir. 1987). A fact is "material" when, under the governing substantive law, it could affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A "genuine issue" of material fact arises if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.*

In considering a motion for summary judgment, the court must regard as true the non-moving party's evidence, if it is supported by affidavits or other evidentiary material. *Celotex*, 477 U.S. at 324; *Eisenberg*, 815 F.2d at 1289. However, the non-moving party may not merely rest on its pleadings; it must produce some significant probative evidence tending to contradict the moving party's allegations, thereby creating a material question of fact. *Anderson*, 477 U.S. at 256-57 (holding that the plaintiff must present affirmative evidence in order

to defeat a properly supported motion for summary judgment); *First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 289 (1968).

B. Free Speech

Both Plaintiffs and Defendants move for summary judgment on Plaintiffs' claim that the Sign Code violates the First Amendment (Count 1). (Pls.' MSJ at 2; Defs.' MSJ at 7.) This Court addressed all of the parties' arguments, save one, in the PI Order, as did the Ninth Circuit Court of Appeals. (*See* PI Order at 8-15); *Reed*, 587 F.3d at 973-83. The Court now adopts the reasoning set forth in the PI Order and the opinion of the Ninth Circuit Court of Appeals as regards the content-neutrality of the Town's sign code and whether the treatment of noncommercial speech versus commercial speech amounts to a First Amendment violation. For the following reasons, the Court finds that Defendants are entitled to summary judgment on Plaintiffs' First Amendment challenge to the Sign Code.

"Facial constitutional challenges come in two varieties: First a plaintiff seeking to vindicate his own constitutional rights may argue that an ordinance 'is unconstitutionally vague or impermissibly restricts a protected activity.'" *Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1033 (9th Cir. 2006) (quoting *Foti v. City of Menlo Park*, 146 F.3d 629, 635 (9th Cir. 1998)). In this type of challenge, "[p]laintiffs may seek directly on their own behalf the facial invalidation of overly broad statutes that 'create an unacceptable risk of the suppression of ideas.'"

Nunez v. City of San Diego, 114 F.3d 935, 949 (9th Cir. 1997) (quoting *Sec'y of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 965 n.13 (1984) (internal quotation and citation omitted)). "Second, 'an individual whose own speech or expressive conduct may validly be prohibited or sanctioned is permitted to challenge a statute on its face because it also threatens others not before the court.'" *Santa Monica Food Not Bombs*, 450 F.3d 1022 at 1033 (quoting *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 503 (1985)). The first kind of challenge, which is what Plaintiffs assert here, is frequently paired with the more common as-applied challenge, wherein a plaintiff argues that a law is unconstitutional as applied to his or her own speech or conduct. *See id.* at 1034. In reviewing the PI Order, the Ninth Circuit Court of Appeals concluded that "Good News has not demonstrated that its facial challenge to § 4.402(P) warrants separate review." *Reed*, 587 F.3d at 974. Indeed, nothing in the record presently before the Court "'indicat[es] that the ordinance will have any different impact on any third parties' interest in free speech than it has on [Good News.]'" *Id.* (quoting *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 801 (1984)). The Court therefore analyzes the concrete case at issue here: "whether § 4.402(P) is unconstitutional as applied to Good News." *Id.*

Regulation of speech in a traditional public forum "is subject to the highest scrutiny." *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992). Public streets and sidewalks are "the archetype of a traditional public forum." *Frisby v. Schultz*, 487 U.S. 474, 480 (1988); *see also Madsen v.*

Women's Health Ctr., 512 U.S. 753, 764 (1994) (describing street, sidewalk, and right-of-way surrounding a clinic as a traditional public forum). The appropriate level of scrutiny depends on whether the ban on speech is tied to content of the message. *See Frisby*, 487 U.S. at 481. "Discrimination against speech because of its message is presumed to be unconstitutional." *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828 (1995). A content-based restriction applied to speech in a "public forum[]" is only permissible if it "is necessary to serve a compelling state interest and is narrowly drawn to achieve that end." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983) (citing *Carey v. Brown*, 447 U.S. 455, 461 (1980)). However, the government may enforce content neutral restrictions on the time, place, and manner of otherwise protected speech. *Rosenbaum v. City & Cnty. of S.F.*, 484 F.3d 1142, 1158 (9th Cir. 2007) (citing *Faith Ctr. Church Evangelistic Ministries v. Glover*, 480 F.3d 891, 907 (9th Cir. 2007)). To enforce such a regulation, the government must show that the provision is "content neutral, [is] narrowly tailored to serve a significant government interest, and leave[s] open ample alternative channels of communication." *Perry Educ. Ass'n*, 460 U.S. at 45 (citations omitted). "A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Ward v. Rock Against Racism*, 491 U.S. 781, 797 (1989).

1. Content Neutrality and Intermediate Scrutiny

"The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Ward*, 491 U.S. at 791. The Supreme Court held in *Ward* that the government's purpose in implementing the law "is the controlling consideration," and, as stated above, "[a] regulation that serves purposes unrelated to the content of expression is deemed neutral." *Id.* Therefore, "[g]overnment regulation of expressive activity is content neutral so long as it is '*justified* without reference to the content of the regulated speech.'" *Id.* (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

In the PI Order, this Court preliminarily found that § 4.402(P) was content neutral. (PI Order at 11.) The Court of Appeals concurred and noted, "[O]ur focus should be on determining whether the ordinance targets certain content; whether the ordinance or exemption is based on identification of a speaker or event instead of on content; and whether an enforcement officer would need to distinguish content to determine applicability of the ordinance." *Reed*, 587 F.3d at 976-79. The Court of Appeals rejected Plaintiffs' expansive interpretation of the "officer must read it test," concluding that a cursory examination of a sign to learn who is speaking and the time of the event "is not akin to an

officer synthesizing the expressive content of the sign." *Id.* at 978 (citations omitted).

For the reasons outlined in the PI Order and in *Reed*, the Court now finds that §4.402(P) is a content-neutral regulation of speech that seeks to identify who is speaking and what event is occurring and does not discriminate on the basis of content. Therefore, it is subject to intermediate scrutiny, and the Court must "determine whether the [c]ode is narrowly tailored to achieve significant government interests and leaves open ample alternative channels for communication." *G.K. Ltd. Travel v. City of Lake Oswego*, 436 F.3d 1064, 1079 (9th Cir. 2006).

2. Time, Place, and Manner Analysis

For the reasons outlined in both the PI Order and *Reed*, the Court finds that § 4.402(P) is narrowly tailored to serve a significant government interest. The Town's asserted interests, namely

- Establishing comprehensive sign regulations that are necessary and in the public interest;
- Promoting effective means of communications;
- Promoting public order by allowing charitable, religious, educational, community service, and other organizations to provide announcement of and directions to events;
- Promoting vehicular and pedestrian safety;
- Promoting the general welfare; and

- Enhancing the Town's community aesthetics

are significant ones. (Defs.' MSJ at 12); *see also G.K. Ltd.*, 436 F.3d at 1079 ("[T]he City's interests in regulating speech to preserve aesthetics and protect traffic and traveler safety are significant."); *One World One Family Now v. City & Cnty. of Honolulu*, 76 F.3d 1009, 1013 (9th Cir. 1996) ("Cities have a substantial interest in protecting the aesthetic appearance of their communities by 'avoiding visual clutter' [and] assuring safe and convenient circulation on their streets." (quoting *Vincent*, 466 U.S. at 806-07)); *Vincent*, 466 U.S. at 805 ("It is well settled that [a municipality] may legitimately exercise its police powers to advance esthetic values."); *Metromedia v. City of San Diego*, 453 U.S. 490, 507-508 (1981) ("Nor can there be substantial doubt that the twin goals that the ordinance seeks to further–traffic safety and the appearance of the city–are substantial governmental goals.").

Moreover, § 4.402(P) is narrowly tailored to achieve those interests. Narrow tailoring

> requires that the regulation actually advance the government's interest, but it need not do so in the least restrictive or least intrusive way. "So long as the means chosen are not substantially broader than necessary to achieve the government's interest the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less speech-restrictive alternative."

Reed, 587 F.3d at 979 (quoting *G.K. Ltd.*, 436 F.3d at 1073-74 (internal citation omitted)). The Court examined the restriction in detail in the PI Order and now concludes that the analysis applies to a final determination as well. (*See* PI Order at 12-13.) The Town asserts that the "regulations are specifically related to the purpose of a temporary directional sign – i.e., traffic direction." (Defs.' MSJ at 12.) In other words, the limitations on size, number, and duration of Qualifying Event Signs is tailored to the goal of alerting passers-by of the time and location of an event, rather than other goals of signage, such as advertising or political advocacy.

As detailed in the PI Order, there are numerous other methods Plaintiffs can use to communicate the time, date, and location of their church services. (PI Order at 13 (outlining methods such as leaflets, emails, carrying signs, posting religious signs on public property, advertising in the newspaper, etc.).) In addition, Plaintiffs can use the Internet and social media to communicate with people who might attend the church services. "These alternative channels of communication ensure that Plaintiffs are able to 'communicate effectively' with members of the public, and there is no evidence to suggest that by failing to expand or eliminate the restrictions of § 4.402(P), the Town is interfering with a 'uniquely valuable or important mode of communication.'" (PI Order at 13 (quoting *G.K. Ltd.*, 436 F.3d at 1080).)

3. Noncommercial v. Commercial Speech

The Court also addressed the Sign Code's treatment of commercial speech as compared to noncommercial speech in the PI Order. (PI Order at 13-15.) Considering the specific examples of "Weekend Directional Signs" and HOA Temporary Event Signs the Court found that the Sign Code "does not impermissibly favor commercial speech over noncommercial speech" and, in fact, that noncommercial speech is more favorably treated than commercial speech, "giving Plaintiffs substantially greater flexibility [than the selected commercial speakers] in directing a larger segment of the public to their events." (*Id.* at 15.) The Court of Appeals affirmed this conclusion, *Reed*, 587 F.3d at 981-82, and the Court now adopts it as a non-preliminary finding.

Qualifying Event Signs, such as those Plaintiffs wish to place, may be placed on weekdays as well as weekends, may be a larger size than Weekend Directional Signs, and while Qualifying Events Signs may not be placed in the right-of-way, they are not restricted to a two-mile radius of the event, as Weekend Directional Signs are. *See* Sign Code §§ 4.402(D)(15), 4.402(P), 4.405(B)(2). Crucially, Qualifying Event Signs do not require a permit, whereas Weekend Directional Signs do. *See id.* § 4.402(A), (D). HOA Temporary Event Signs are governed by § 4.406(C)(4), may be up to 80 square feet and may only be posted within the limits of the residential community. These signs may be posted up to 30 days prior to the event and must be

removed within 48 hours of the completion of the event. The Court also considers the Sign Code's treatment of HOA Temporary Event Signs to be less favorable than its treatment of Qualifying Event Signs because HOA Temporary Event Signs require a permit. *See* § 4.406(C)(4); *see also G.K. Ltd.*, 436 F.3d at 1082 (reasoning that permits constitute "prior restraints [that] are constitutionally suspect"). Also, Qualifying Event Signs are not limited to a specific geographic location the way Weekend Directional Signs are.

4. Discrimination Among Types of Noncommercial Speech

The Court of Appeals remanded this matter so that this Court could consider "whether Gilbert impermissibly 'evaluate[d] the strength of, or distinguished between, various [noncommercial] communicative interests.'" *Reed*, 587 F.3d at 983 (quoting *Metromedia*, 453 U.S. at 514). "Not only must a municipality refrain from favoring commercial over noncommercial speech, it also may not favor certain noncommercial speech over other noncommercial speech without facing stricter review." *Id.* at 982. Municipalities "may distinguish between the relative value of different categories of commercial speech," but they do "not have the same range of choice in the area of noncommercial speech to evaluate the strength of, or distinguish between, various communicative interests." *Metromedia*, 453 U.S. at 514 (holding that an ordinance is invalid if it regulates noncommercial billboards based on their content); *see also Nat'l Adver. Co. v. City of Orange*, 861 F.2d 246, 249 (9th Cir. 1988) ("The Constitution

forbids the selective prohibition of protected noncommercial speech based on its content."). In *City of Orange*, the Ninth Circuit Court of Appeals held "that the City cannot analyze the content of outdoor noncommercial messages to determine whether they are allowed, and if so where." 861 F.2d at 249 (citation omitted). The ordinance at issue there exempted "certain governmental signs and flags, memorial tablets, recreational signs, and temporary political, real estate, construction, and advertising signs" from a general ban on off-site signs. *Id.* at 247.

Plaintiffs argue that the way Qualifying Event Signs are treated, as opposed to Political or Ideological Signs, violates the First Amendment. (Pls.' MSJ at 3-8.) Plaintiffs do not argue that their speech or other noncommercial speech is entirely prohibited. The Town responds that the Sign Code does not (a) effect a total ban on off-site noncommercial advertising, as in *Metromedia* and *City of Orange*, or (b) regulate on the basis of content. (Defs.' MSJ at 8.) Instead, the Town argues that the Sign Code contains "speaker- and eventbased exemptions," such as have been upheld by the Ninth Circuit Court of Appeals. (*Id.* (citing *G.K. Ltd*, 436 F.3d at 1076).) Indeed, in *G.K. Ltd.*, the court ruled that exemptions from a permitting requirement that were based on speaker or event did not violate the First Amendment because they did not require a law enforcement officer to read the sign's message in order to enforce the law. *See* 436 F.3d at 1076-78. The officer was only required to decide whether the exemption applied after identifying the speaker or whether a triggering

event occurred, without regard to the content of the sign. *Id.* at 1078.

Section 4.402 of the Sign Code provides a list of types of signs that are exempted from the permitting requirement. Qualifying Event Signs are governed by § 4.402(P) of the Sign Code, which sets forth restrictions on size, number, time, and location for the posting of such signs. A Qualifying Event Sign may be up to six square feet in size and may be posted up to 12 hours before the event, during the event, and up to one hour after the event. Up to four Qualifying Event Signs may be posted on a single property, but there is no overall limitation on number of signs. Qualifying Event Signs may be posted off-site, but they may not be placed in the right-of-way or on fences, boulders, plants, other signs, vehicles, utility facilities or any structure.

Political Signs are governed by § 4.402(I). Political Signs may be up to 16 square feet on property zoned for residential use and up to 32 square feet on property zoned for nonresidential use, undeveloped Town property, or rights-of-way. Political Signs must be removed no later than 10 days following the election. Political Signs may be placed in the right-of-way, provided that they do not impede visibility. Ideological Signs are covered in § 4.402(J). Ideological Signs may be up to 20 square feet in area and are permitted in all zoning districts. Section 4.402(J) is silent on whether Ideological Signs may be placed in the right-of-way.

The Court finds that the Gilbert Sign Code's treatment of Political, Ideological, and Qualifying

Event Signs is akin to the regulation at issue in *G.K. Ltd.* Both Political Signs and Qualifying Event Signs relate, in substance, to events–an election or a specified event fitting the definition in the Sign Code. In the case of Political Signs, the event is of widespread interest and takes place at a fixed, regular interval. A Qualifying Event might take place once, or it might take place several times a week, depending on the type of event. A Qualifying Event Sign could involve so-called "core" speech, but Political Signs are always core speech. *See Kaplan v. County of L.A.*, 894 F.2d 1076, 1079 (9th Cir. 1990) ("Political speech lies at the core of the First Amendment's protections."). To distinguish between a Political Sign and a Qualifying Event Sign, an officer need only skim the sign to determine the speaker (e.g., is a non-profit speaking?) and the event at issue (e.g., does this relate to an election or a Qualifying Event?). In *G.K. Ltd.*, the court concluded that speaker- and eventbased exemptions did not render a sign regulation content-based because the municipality was distinguishing on the basis of the speaker's identity and whether a triggering event had occurred, *not* on the basis of the sign's content. 436 F.3d at 1076-78. Here, too, the distinction between Political and Qualifying Event Signs is not on the basis of their message, but rather on the basis of the identity of the speaker and the parameters of the event at issue.

Ideological Signs are not tied to a specific event, the way Political and Qualifying Event Signs are, so they are not subject to an event-based time restriction under the Sign Code. This accounts for the different "time" restriction for Ideological Signs.

As for place, namely whether a particular type of sign can be placed in the right-of-way, Gilbert argues that it has made a municipal decision to limit the overall number of signs in the right-of-way, and it does not discriminate at all among Ideological Signs. In fact, the Sign Code is quite terse when it comes to Ideological Signs and makes no reference to the content of the particular ideological message. Although Defendants assert that "Ideological [S]igns may not be placed within a right-of-way," the Court was unable to find that restriction in the Sign Code itself after careful and thorough review. (*See* Defs.' Resp. to PSOF ¶ 36 (citing JSOF, Ex. A at 9).) Nonetheless, the Court finds that the Sign Code does not distinguish on the basis of the message of the sign because, other than signs related to events–whether those events are elections or bake sales–the Sign Code treats all messages on equal footing. Ideological Signs of all types are categorized together. *See* § 4.402(J). Because Ideological Signs do not relate to an event, they are distinguishable from Qualifying Event Signs. To determine whether a sign is an Ideological Sign or a Qualifying Event Sign, an officer does not need to read the content; he or she need only look to see whether the sign concerns an event. If it does, the officer then determines its treatment, as discussed *supra*.

5. Vagueness and Overbreadth

Plaintiffs also argue that the Sign Code is "impermissibly vague and overbroad," in the context of their First Amendment theory in their first cause of action, because the law does not contain guidelines to govern a situation in which a sign has

more than one kind of speech on it, for example a sign with political speech and details about a qualifying event. (Pls.' MSJ at 9-10.) Plaintiffs also assert that the Sign Code "restricts more speech than necessary to further the Town's interests in aesthetics and safety." (*Id.* at 10.) "Vagueness doctrine is an outgrowth not of the First Amendment, but of the Due Process Clause of the Fifth Amendment." *United States v. Williams*, 553 U.S. 285, 128 S. Ct. 1830, 1845 (2008).[6] A statute is void for vagueness if it does not "provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *Id.* (citing *Hill v. Colorado*, 530 U.S. 703, 732 (2000); *Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972)).

In the First Amendment context, plaintiffs are permitted "to argue that a statute is overbroad because it is unclear whether it regulates a substantial amount of protected speech." *Id.* (citing *Reno v. A.C.L.U.*, 521 U.S. 844, 870-874 (1997); *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494-495 & nn.6-7 (1982)). Requirements for clarity are enhanced both where a

---

[6] The vagueness doctrine arising from the Fifth Amendment's Due Process Clause and the First Amendment is incorporated against the states via the Fourteenth Amendment. *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (incorporating the First Amendment against the states); *Great Am. Houseboat Co. v. United States*, 780 F.2d 741, 746 n.3 (9th Cir. 1986) (observing that vagueness doctrine applies to the states through the Fourteenth Amendment's due process clause).

statute provides for a criminal penalty and where First Amendment rights are implicated. *See Info. Providers' Coal. for the Def. of the First Amendment v. F.C.C.*, 928 F.2d 866, 874 (9th Cir. 1991) (citing *Grayned*, 408 U.S. at 109). However, "perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." *Ward*, 491 U.S. at 794. In recognition that words and their meanings cannot be ascertained with "mathematical certainty," a "statute's vagueness exceeds constitutional limits if its 'deterrent effect on legitimate expression is both real and substantial, and if the statute is [not] readily subject to a narrowing construction'" by the court. *Cal. Teachers Ass'n v. State Bd. of Educ.*, 271 F.3d 1141, 1151 (9th Cir. 2001) (quoting *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 60 (1976)). The law in the Ninth Circuit "is that commercial/non-commercial and onsite/offsite distinctions [in sign ordinances] are not unconstitutionally vague." *Maldonado v. Morales*, 556 F.3d 1037, 1046 (9th Cir. 2009) (citations omitted) (collecting cases).

Here, the deterrent effect of the Town's Sign Code is insubstantial and remote. The ordinance provides plenty of guidance for people of ordinary intelligence to determine what conduct is permitted and prohibited, and it does not foster arbitrary, capricious, or discriminatory enforcement. The evidence Plaintiffs cite in favor of their vagueness theory is the testimony of Town officials at their depositions in response to hypothetical situations described by Plaintiffs' attorneys. (*See* Pls.' MSJ at 10.) The Town employees also testified that they had never seen a sign like the one proposed in Plaintiffs'

hypothetical, including both political and ideological information. (*See id.*, Ex. 3, Dep. of Adam Adams 30:17-20, Ex. 4, Dep. of Steve Wallace 31:8-15.) For the purposes of a facial challenge, the crucial evidence is the ordinance itself, and the Court finds that the Sign Code is not void for vagueness. The Court further concludes that the Sign Code does not sweep in substantially more speech than necessary to achieve the Town's goals of safety and aesthetics. As explained above, the Sign Code is narrowly tailored to achieve these interests.

B. Equal Protection

Plaintiffs and Defendants both move for summary judgment on the second cause of action in the Amended Complaint: Plaintiffs' equal protection claim. (Pls.' MSJ at 17; Defs.' MSJ at 13.) "The Equal Protection Clause requires that statutes affecting First Amendment interests be narrowly tailored to their legitimate objectives." *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 101 (1972) (citations omitted); *accord A.C.L.U. of Nevada v. City of Las Vegas*, 466 F.3d 784, 799 (9th Cir. 2006). However, "[t]he equal protection guarantee of the Fourteenth Amendment does not take from the States all power of classification." *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 271 (1979) (citing *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 314 (1976)). "When the basic classification is rationally based, uneven effects upon particular groups within a class are ordinarily of no constitutional concern." *Id.* at 272 (citations omitted). The Court stated in the PI Order, "[A]ny uneven effects on Plaintiffs are merely an unintended consequence of the content-neutral

regulation that the Court has already determined to be narrowly tailored to the Town's legitimate objectives." (PI Order at 16.) The Sign Code regulates not on the basis of content, but rather to address legitimate concerns of traffic safety and aesthetics. Moreover, the Court concluded above that the Sign Code is narrowly tailored to achieve significant government interests and leaves open ample alternative channels for communication. Therefore, Defendants are entitled to summary judgment on their equal protection claim.

C. Free Exercise and Arizona's FERA

Plaintiffs and Defendants both move for summary judgment on Plaintiffs' third and fourth causes of action: violation of the free exercise clause of the First Amendment and of Arizona's FERA, respectively. (Pls.' MSJ at 12-17; Defs.' MSJ at 13-15.) "[A] law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993) (citing *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872 (1990)). If a law is not neutral and generally-applicable, it must survive strict scrutiny by being narrowly tailored to advance a compelling governmental interest. *Id.* at 531-32.

To ascertain whether a law is neutral, courts begin by examining the language of the statute. *Id.* at 532. The inquiry does not end there, however: "[f]acial neutrality is not determinative. The Free

Exercise Clause protects against governmental hostility which is masked, as well as overt." *Id.* at 534. "A law is one of neutrality and general applicability if it does not aim to 'infringe upon or restrict practices because of their religious motivation,' and if it does not 'in a selective manner impose burdens only on conduct motivated by religious belief[.]'" *San Jose Christian Coll. v. City of Morgan Hill*, 360 F.3d 1024, 1031 (9th Cir. 2004) (quoting *Lukumi*, 508 U.S. at 533, 543). The Ninth Circuit Court of Appeals has held that rational basis review applies to determinations of whether a neutral law of general applicability "violate[s] the right to free exercise of religion even though the law incidentally burdens a particular religious belief or practice." *Id.* (quoting *Miller v. Reed*, 176 F.3d 1202, 1206 (9th Cir. 1999)).[7]

Plaintiffs have not demonstrated that the Gilbert Sign Code is not neutral and of general applicability. The language of the amended Sign Code does not single out signs with religious messages. Plaintiffs argue that the law is "underinclusive" because "the

---

[7] The Supreme Court stated in *Smith* that if a generally-applicable law implicates other constitutional protections along with the free exercise of religion, "such as freedom of speech," it must withstand strict scrutiny. *San Jose Christian Coll.*, 360 F.3d at 1031 (quoting *Smith*, 494 U.S. at 881). This is known as "hybrid rights" analysis. *Id.* (citing *Miller*, 176 F.3d at 1204). Plaintiffs argue that their Complaint involves a so-called "hybrid rights" claim, a theory that has been widely criticized. (Pls.' MSJ at 11 n.8.) The Ninth Circuit Court of Appeals has declined to "allow[] a plaintiff to bootstrap a free exercise claim in this manner." *Jacobs v. Clark County Sch. Dist.*, 526 F.3d 419, 440 n.45 (9th Cir. 2008). The Court will not address this possibility, as it is foreclosed in this circuit.

Church's temporary directional signs must abide by strict limitations , while more lenient limitations are placed on Political, Ideological, and HOA Signs." (Pls.' MSJ at 12.) However, as explained above, while the restrictions on Political and Ideological Signs might be different, they are not more restrictive than those placed on Qualifying Event Signs. Also, the requirements for Qualifying Event Signs that apply to Plaintiffs also apply to any other non-profit wishing to direct the public to an event. Plaintiffs are not singled out, nor is the rule that applies to them geared only to religious events or religious speech. Plaintiffs' argument that the Sign Code violates the free exercise clause of the First Amendment because it treats commercial speech differently from noncommercial speech was addressed above, and it is unavailing.

Both Plaintiffs and Defendants also seek summary judgment on Plaintiffs' claim under Arizona's FERA. (Pls.' MSJ at 13-17; Defs.' MSJ at 15-18.) "The legislature passed FERA in 1999 to protect Arizona citizens' right to exercise their religious beliefs free from undue governmental interference." *State v. Hardesty*, 214 P.3d 1004, 1006 (Ariz. 2009) (citing 1999 Ariz. Sess. Laws, ch. 332, § 2 (1st Reg. Sess.)). Under FERA, the government may burden the exercise of religion only if the "application of the burden to the person is both [i]n furtherance of a compelling governmental interest [and] [t]he least restrictive means of furthering that compelling governmental interest." Ariz. Rev. Stat. ("A.R.S.") §41-1493.01(C). The Arizona Supreme Court has held that a party bringing a FERA claim must establish: "(1) that an

action or refusal to act is motivated by a religious belief, (2) that the religious belief is sincerely held, and (3) that the governmental action substantially burdens the exercise of religious beliefs." *Hardesty*, 214 P.3d at 1007. Once the claimant establishes those three elements, the burden shifts to the government to demonstrate that the state action is the least restrictive means of furthering a compelling governmental interest. *Id.*

Defendants argue that they are entitled to summary judgment on this claim because the Sign Code "does not substantially burden [Plaintiffs'] exercise of religion." (Defs.' MSJ at 15.) The statute provides, "[T]he term substantially burden is intended solely to ensure that this article is not triggered by trivial, technical, or de minimis infractions." A.R.S. § 41-1493.01(E). In *Hardesty*, the Arizona Supreme Court cited to several cases applying different laws that also contain the substantial burden standard or something similar. *See* 214 P.3d at 1007. In *Wisconsin v. Yoder*, 406 U.S. 205, 215-18 (1972), the Supreme Court considered whether Wisconsin's compulsory attendance law substantially interfered with Amish families' right to freely exercise their religion. In that case, the Supreme Court held that "the Wisconsin law affirmatively compels [the plaintiffs], under threat of criminal sanction, to perform acts undeniably at odds with fundamental tenets of their religious beliefs." *Id.* at 218 (citation omitted).

Here, Plaintiffs are not being compelled to do anything that undermines their religious beliefs; rather, they assert that not being able to post more

signs in different locations prevents them from reaching the maximum number of people they might attract to their services. (Pls.' MSJ at 15-16 (describing how, when permitted to post more signs, the Church had a congregation of 38 people, as compared to its current attendance of approximately 30 people).) Plaintiffs' situation is not analogous to the plaintiffs in *Yoder*. For one thing, the evidence regarding attendance rates is hardly overwhelming: a difference of eight people could be attributable to numerous factors besides location and number of signs directing people to the church service. Also, for Amish parents, sending their children to school in Wisconsin was an all-or-nothing proposition, whereas Plaintiffs here are able to post signs under certain conditions and are not wholly prevented from doing so. Similarly, in *Sherbert v. Verner*, 374 U.S. 398, 406 (1963), another cases cited by the *Hardesty* court, the plaintiff would have been forced "to violate a cardinal principle of her religious faith" in order to receive state unemployment benefits. That is simply not the case here.

The Court finds that the Sign Code does not substantially burden Plaintiffs' free exercise of their religion. Any burden placed on their religious exercise is more in the nature of a "de minimis" impact, which does not constitute a substantial burden under the FERA. A.R.S. § 41-1493.01(E). *Yoder* and *Sherbert* are inapposite: in those cases, the plaintiffs were affirmatively obligated to take some action that would interfere with their religious beliefs. In other words, "a 'substantial burden' is imposed only when individuals are forced to choose between following the tenets of their religion and

receiving a governmental benefit (*Sherbert*) or coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions (*Yoder*)." *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1070 (9th Cir. 2008) (applying federal Religious Freedom Restoration Act, which contains the same standard as Arizona's FERA); *see also Seidman v. Paradise Valley Unified Sch. Dist. No. 69*, 327 F. Supp. 2d 1098, 1118 & n.3 (D. Ariz. 2004) (observing that result of free exercise analysis was identical under federal law and the FERA).

No genuine issue of material fact exists as to Defendants' liability on counts three and four of Plaintiffs' First Amended Verified Complaint. Therefore, summary judgment in Defendants' favor is appropriate on these claims.

II. CONCLUSION

For the foregoing reasons, the Court concludes that no genuine issues of material fact remain as to any of Plaintiffs' claims. Defendants are entitled to summary judgment on all counts. Furthermore, as the Court does not rely on or refer to the evidence at issue in Defendants' Objection, that Motion is denied as moot.

IT IS THEREFORE ORDERED denying Plaintiffs Pastor Clyde Reed and Good News Presbyterian Church's Motion for Summary Judgment (Doc. 100).

IT IS FURTHER ORDERED granting Defendants the Town of Gilbert and Adam Adams' Cross-Motion for Summary Judgment (Doc. 97).

IT IS FURTHER ORDERED denying as moot Defendants' Motion for Leave to File Objection to Admission of Evidence (Doc. 111).

IT IS FURTHER ORDERED directing the Clerk to enter judgment in this matter in favor of Defendants.

DATED this 11th day of February, 2011.

s/ Susan R. Bolton

Susan R. Bolton
United States District Judge

Filed: November 20, 2009

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CLYDE REED, Pastor; GOOD NEWS COMMUNITY CHURCH, *Plaintiffs-Appellants*, v. TOWN OF GILBERT, ARIZONA; ADAM ADAMS, in his official capacity as Code Compliance Manager, *Defendants-Appellees*.	No. 08-17384 D.C. No. 2:07-cv-00522-SRB OPINION

Appeal from the United States District Court
for the District of Arizona
Susan R. Bolton, District Judge, Presiding

Argued and Submitted
April 15, 2009—San Francisco, California

Filed November 20, 2009

Before: Stephen Reinhardt, John T. Noonan and M. Margaret McKeown, Circuit Judges.

Opinion by Judge McKeown

COUNSEL

Benjamin W. Bull, Jeremy D. Tedesco, Alliance Defense Fund, Scottsdale, Arizona; David A.

Cortman (argued), Alliance Defense Fund, Lawrenceville, Georgia; Deborah M. Sheasby, Peter A. Gentala, Center for Arizona Policy, Phoenix, Arizona, for the plaintiffs-appellants.

Robert Grasso, Jr., Kim S. Alvarado (argued), Grasso Law Firm, P.C., Chandler, Arizona, for the defendants-appellees.

OPINION

McKEOWN, Circuit Judge:

Although "[i]t is common ground that governments may regulate the physical characteristics of signs," *City of Ladue v. Gilleo*, 512 U.S. 43, 48 (1994), sign regulations have spawned legions of First Amendment challenges. Those challenges arise because signs "pose distinctive problems that are subject to municipalities' police powers," and yet they are also "a form of expression protected by the Free Speech Clause." *Id.* This case presents yet another variation on a sign ordinance—one that prohibits all signs without a permit, subject to nineteen enumerated exemptions ranging from directional signs to ideological and political signs.

Good News Community Church wishes to spread the word about its Sunday services by placing temporary directional signs around the Town of Gilbert, Arizona. Gilbert, however, limits Good News' deployment of temporary directional signs via the town's comprehensive sign ordinance. Good News Community Church and its Pastor, Clyde Reed

(collectively "Good News"), challenge the ordinance's constitutionality under the First and Fourteenth Amendments, contending it impermissibly burdens the right to free speech and treats similar speech unequally.

Good News appeals the district court's denial of a preliminary injunction barring enforcement of the ordinance. Although we conclude the provision of the ordinance directly regulating Good News' signs does not of itself violate the First Amendment, the district court did not address Good News' claim that the ordinance unfairly discriminates among forms of noncommercial speech. Consequently, we remand for the district court to consider this aspect of Good News' challenge, within the context of the preliminary injunction motion.

BACKGROUND

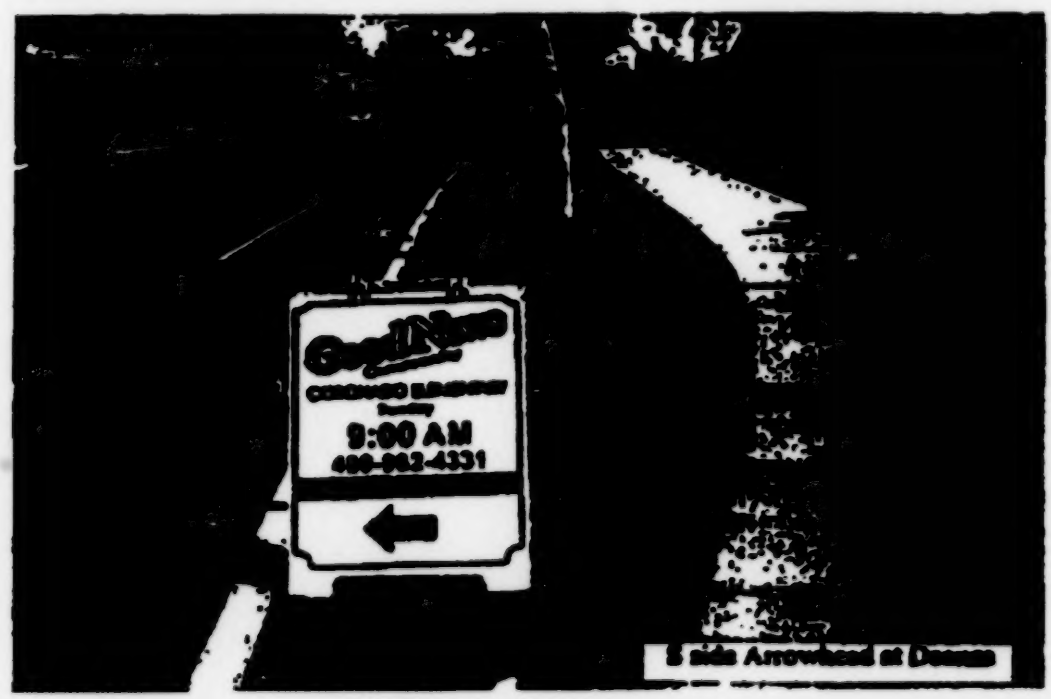
I. USE OF SIGNS BY GOOD NEWS COMMUNITY CHURCH

Good News does not have a permanent sanctuary, and at the commencement of this litigation had been conducting its Sunday church services at an elementary school in the Town of Gilbert, Arizona ("Gilbert") for about five years.[1] Good News averages 45 regular congregants.

---

[1]According to the parties, Good News meets currently at a school in the adjacent town of Chandler, Arizona, approximately one mile from the Gilbert town line. The change in location does not moot the controversy, however, because Good News still wishes to place temporary signs in Gilbert due to its proximity to the church's meeting place.

Members of Good News believe the Bible commands them to "go and make disciples of all nations," and that they "should carry out this command by reaching out to the community to meet together on a regular basis." To do so, they "display [ ] signs announcing their services as an invitation for those in the community to attend." Good News states that "[f]or a time, the Church was placing about 17 signs in the areas surrounding the Church," and that the signs "were placed early in the day each Saturday and removed following the services on Sunday mid-day." Good News uses moveable signs that can be placed on or anchored in the ground. The signs vary slightly, but generally contain the name "Good News Community," the phrase "Your Community Church," a website address and phone number, the location and time of the services, and an indicator directing people to the service. Following is an example of one of the signs:



II. The Sign Code and Enforcement Against Good News

Like many municipalities, Gilbert regulates the display of outdoor signs. Town of Gilbert Land Development Code, Division 4, General Regulations, Article 4.4, Sign Regulations ("Sign Code" or "Code"). Gilbert's Sign Code prohibits certain types of signs altogether. For signs that are not prohibited, the Code imposes a general ban on displaying signs without a permit and establishes some generally applicable restrictions. § 4.402(A). Signs that are allowed with permits are regulated according to general categories, for example, "Real Estate."

The Sign Code exempts from the permitting requirement nineteen types of signs.[2] The signs employed by Good News fall under one of the exemptions, § 4.402(P), for Temporary Directional Signs Relating to a Qualifying Event ("Qualifying Event Signs").

In July 2005, Good News received an email from a Gilbert Code Compliance officer noting a violation

---

[2](1) Signs installed by a governmental jurisdiction; (2) Building Identification Signs; (3) Permanent Regulatory and Parking signs; (4) Information Wall Signs (e.g., "Delivery Entrance"); (5) Real Estate Signs; (6) Residential Open House Signs; (7) Political Signs; (8) Ideological Signs; (9) Garage Sale Signs; (10) Business Identification Banners during street construction; (11) Interim Business Identification Banners; (12) Boutique Signs; (13) Window Signs; (14) A–Frame Signs; (15) Temporary Directional Signs Relating to a Qualifying Event; (16) Construction Signs; (17) Suspended Signs (particular type of commercial sign); (18) Restaurant Menu Signs; and (19) Required Street Addresses. § 4.402(D).

of an earlier version of § 4.402(P) because Good News' signs had been sited too early and in a public right-of-way. A few months later, a Code Compliance officer issued an advisory notice to Good News, stating that signs were displayed outside of the hours allowed and did not include a date for the religious service.

Good News relates that "[a]fter receiving these citations, the Church reduced the number of signs and the amount of time they placed the signs." In February 2007, the Code Compliance Manager told Good News "that there is no leniency under the Code, and that the Church would be cited if it was determined that it had violated any of the applicable provisions in the Code."

III. District Court Proceedings

In March 2008, Good News filed suit in federal court in Arizona, alleging that, on its face and as applied, Sign Code § 4.402(P) violated the Free Speech clause of the First Amendment and the Equal Protection clause of the Fourteenth Amendment. Shortly after filing, Good News moved for a preliminary injunction to stop Gilbert from enforcing § 4.402(P). Gilbert stipulated to a preliminary injunction, as a "sign of good faith," in order for Gilbert to review and amend the original ordinance. The district court granted the stipulated injunction.

In an effort to avoid maintaining a potentially impermissible content-based ordinance, following public hearings the Town Council of Gilbert adopted

an amended Sign Code recommended by the Gilbert Planning Commission. Before passage of the amendment, in January 2008, attorneys for the parties conferred, and Good News advised that, in its view, the proposed amendment did not fix § 4.402(P)'s constitutional infirmities.

The amendments left the Sign Code intact except for § 4.402(P) and related sections.[3] The title of

---

[3]The Sign Code was amended in these pertinent ways.

(1) *Title of § 4.402(P)*—changed from "Religious Assembly Temporary Directional Signs" to "Temporary Directional Signs Relating to a Qualifying Event." Other references to the qualifier "Religious Assembly" were replaced with "Relating to a Qualifying Event."

(2) *Size*—changed from 3 feet high to 6 feet, although still not to exceed 6 square feet.

(3) *Number*—retained limit of four per single property; clarified there may be unlimited total.

(4) *Display*—changed from "up to 2 hours before, and 1 hour after the religious service," to "up to 12 hours before, during, and 1 hour after the qualifying event ends."

(5) *Glossary definition of "Temporary Directional Signs Relating to a Qualifying Event" added*—"A temporary sign intended to direct pedestrians, motorists, and other passersby to a 'Qualifying Event.' A 'Qualifying Event' is any assembly, gathering, activity or meeting sponsored, arranged, or promoted by a religious, charitable, community service, educational, or other similar non-profit organization."

§ 4.402(P) was changed from "Religious Assembly Temporary Directional Signs" to "Temporary Directional Signs Relating to a Qualifying Event." A new definition was added to the glossary for these signs, expanding the coverage of § 4.402(P) to signs related to any events sponsored by non-profit organizations, not just religious gatherings. The restrictions on physical characteristics and use of signs under § 4.402(P) were somewhat modified, although the restriction that Qualifying Event Signs may not be placed in public rights-of-way was retained.

Immediately following adoption of the amended regulation, Good News filed a notice that the amended Sign Code failed to resolve the lawsuit, an amended verified complaint, and a second motion for preliminary injunction.[4] Good News has not been cited under the amended Sign Code, but states that it is not placing signs in the rights-of-way "due to the prohibitions in the amended Code."

---

(6) *Glossary definition of "Ideological Sign" amended*—definition amended to read: "a sign communicating a message or ideas for non-commercial purposes that is not a construction sign, directional sign, temporary directional sign relating to a qualifying event, political sign, garage sale sign, or a sign owned or required by a governmental agency."

[4]In addition to the free speech and equal protection claims, Good News also claimed that § 4.402(P) violated the Free Exercise Clause of the First Amendment and Arizona's Religious Freedom Restoration Act (ARFRA), A.R.S. § 41–1493.01. Good News did not seek the preliminary injunction on the basis of these claims, which are not at issue in this appeal.

In September 2008, the district court denied the motion for preliminary injunction. The court concluded that § 4.402(P) is a content-neutral regulation, and that it passes the applicable intermediate level of scrutiny. It further found that the Sign Code does not favor commercial speech over noncommercial speech. Based on its determination that the provision is content-neutral, the court concluded that § 4.402(P) does not violate equal protection, as any uneven effects are an unintended consequence of the lawful content-neutral regulation.

ANALYSIS

This case comes to us on appeal from the denial of a preliminary injunction. Although we review the denial of a preliminary injunction for abuse of discretion, "we review the legal issues underlying the district court's decision de novo." *Foti v. City of Menlo Park*, 146 F.3d 629, 634-635 (9th Cir. 1998).

The Supreme Court recently summarized the threshold for granting the extraordinary relief of a preliminary injunction: "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Natural Res. Def. Council, Inc.* 129 S.Ct. 365, 374 (2008); *see also Am. Trucking Ass'ns, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009) (quoting same). Because the district court concluded that Good News was

unlikely to succeed on the merits of its claims, the court did not reach the further inquiries regarding harm, equities and the public interest. Our focus therefore is a legal one—whether the district court erred in its judgment that Good News is unlikely to succeed on the merits because the regulation passes muster under the First and Fourteenth Amendments.

Good News claims that § 4.402(P) violates the First Amendment and the Fourteenth Amendment, both on its face and as applied to Good News' signs. There are two ways an ordinance may be judged unconstitutional on its face: "[E]ither because it is unconstitutional in every conceivable application, or because it seeks to prohibit such a broad range of protected conduct that it is unconstitutionally 'overbroad.' " *Members of City Council v. Taxpayers for Vincent,* 466 U.S. 789, 796 (1984). The first type of facial challenge "may be paired with the more common as-applied challenge, where a plaintiff argues that the law is unconstitutional as applied to his own speech or expressive conduct." *Santa Monica Food Not Bombs v. City of Santa Monica,* 450 F.3d 1022, 1034 (9th Cir. 2006). Good News opts for this route, claiming that § 4.402(P) would be unconstitutional as applied to any Qualifying Event Sign and that it is also invalid as applied to Good News' signs.

Good News, however, has not demonstrated that its facial challenge to § 4.402(P) warrants separate review. "[W]e have found nothing in the record to indicate that the ordinance will have any different impact on any third parties' interest in free speech

than it has on [Good News.]" *Vincent*, 466 U.S. at 801. "[Good News'] attack on the ordinance is basically a challenge to the ordinance as applied to [its] activities. We therefore limit our analysis of the constitutionality of the ordinance to the concrete case before us ," whether § 4.402(P) is unconstitutional as applied to Good News. *Id.* at 803.

I. CONSTITUTIONALITY OF QUALIFYING EVENT REGULATION

We begin with the simple proposition that Gilbert's sign regulation is subject to First Amendment scrutiny. In an effort to promote a safe, harmonious and pleasant environment—and presumably to insulate itself from challenges under the First Amendment—Gilbert has adopted a sign ordinance that makes one's head spin to figure out the bounds of its restrictions and exemptions. Our initial focus is on § 4.402(P), the exemption that regulates Qualifying Event Signs.

A. CONTENT-BASED REGULATIONS

[1] The first question is whether § 4.402(P) is a regulation based on the content of speech. *See Ladue*, 512 U.S. at 59 (O'Connor, J., concurring) ("The normal inquiry that our doctrine dictates is, first, to determine whether a regulation is content based or content neutral, and then, based on the answer to that question, to apply the proper level of scrutiny."). "A regulation is content-based if either the underlying purpose of the regulation is to suppress particular ideas or, if the regulation, by its very terms, singles out particular content for

differential treatment." *Berger. v. City of Seattle,* 569 F.3d 1029, 1051 (9th Cir. 2009) (internal citations omitted). Exemptions to otherwise permissible regulations must none-the-less be scrutinized as "an exemption may represent a governmental attempt to give one side of a debatable public question an advantage in expressing its views to the people." *Ladue,* 512 U.S. at 51 (internal quotation omitted).

According to the Purposes section of the ordinance, the Sign Code was adopted to assure "proper and efficient expression through visual communication" that is "compatible with the character and environment" of Gilbert; to eliminate confusing, distracting and unsafe signs; and to enhance the aesthetic environment of the town. § 4.401. Nothing in the regulation suggests any intention by Gilbert to suppress certain ideas through the Sign Code, nor does Good News claim that Gilbert had any illicit motive in adopting the ordinance. Gilbert asserts that the exemptions to the Sign Code were included to accommodate the speech interests of various members of the Gilbert community, and that, in particular, § 4.402(P) is intended to provide groups such as Good News the opportunity to spread the word about their events without the restriction of a permitting process. Gilbert's unimpeached intentions, however, do not satisfy our inquiry. *See Foti,* 146 F.3d at 636 n.7 ("Although Menlo Park's exemptions for open house signs and safety, traffic, and informational signs seem innocuous, we base our content-based determination on whether the ordinance singles out certain speech for differential treatment based on

the idea expressed. The reasonableness, harmlessness, or worthiness of the idea is irrelevant.").

[2] "[W]hether a statute is content neutral or content based is something that can be determined on the face of it; if the statute describes speech by content then it is content based." *Menotti v. City of Seattle,* 409 F.3d 1113, 1129 (9th Cir. 2005) (quoting *City of Los Angeles v. Alameda Books, Inc.,* 535 U.S. 425, 448 (2002) (Kennedy, J., concurring)) (internal quotation marks omitted). This succinct summation of the law does not address what is meant by "content." We look to two Ninth Circuit cases that are helpful in giving texture and meaning to the term when applied to a sign ordinance.

In *Foti v. City of Menlo Park,* the sign ordinance placed a general ban on posting signs on public property or displaying signs in public rights-of-way. 146 F.3d at 633-34. But the Menlo Park code included exemptions for temporary "open house" real estate signs; signs placed by government entities; safety, traffic, and public informational signs; certain signs on cars; and pickets. *Id.* Picketers, such as the plaintiffs, who wanted to protest outside of a family planning clinic, were limited to carrying one sign under three square feet, and had to move while carrying the sign. *Id.*

We concluded that the "exemptions [in the Menlo Park ordinance] for 'open house' real estate signs and safety, traffic, and public informational signs are content-based. To enforce the ordinance, a law enforcement officer must 'examine the content of

signs to determine whether the exemption applies.' " *Foti*, 146 F.3d at 636 (quoting *Desert Outdoor Advert. v. City of Moreno Valley*, 103 F.3d 814, 820 (9th Cir. 1996)). Good News points to *Foti* as the controlling case.

Gilbert argues that instead of drawing support from *Foti*, we should look to *G.K. Limited Travel v. City of Lake Oswego*, 436 F.3d 1064 (9th Cir. 2006). In *G.K. Limited*, the city of Lake Oswego, Oregon, passed a sign ordinance that banned the erection of new signs on poles and required taking down existing pole signs,[5] either when the "copy" on the sign changed or by a general deadline set by the ordinance. 436 F.3d at 1069. G.K. Limited, a travel agency, purchased another agency that owned a pole sign. G.K. Limited wanted to change the copy of the pole sign by substituting its name, and objected to the requirement that it remove the sign to comply with the Lake Oswego code. We concluded that the grandfather provision of the ordinance was content neutral, and sounded a caution:

> Plaintiffs attempt to broaden *Foti* to stand for the proposition that any time an ordinance requires a law enforcement officer to read a sign, the ordinance must be content based. We reject such an expansive reading. The *Foti* test actually turns on "whether the ordinance singles out certain speech for differential treatment based on the idea expressed"; enforcement officials having to

---

[5]Pole signs are free-standing signs that stand more than a few feet above the ground.

> read a sign is persuasive evidence of such a purpose but may not always be dispositive.

G.K. Ltd., 436 F.3d at 1078 (quoting *Foti*, 146 F.3d at 636).

We went on to explain the rationale underlying *Foti*:

> In *Foti*, we evaluated a Menlo Park ordinance banning all signs on all public property. The law, however, exempted "open house," safety, traffic and public information signs. Relying on our earlier ruling in *Desert Outdoor Advertising v. City of Moreno Valley*, 103 F.3d 814, 820 (9th Cir. 1996), we concluded that these exemptions were content based "because a law enforcement officer must read a sign's message to determine if the sign is exempted from the ordinance." *Foti*, 146 F.3d at 636. Menlo Park was clearly expressing a preference for certain types of signs by exempting them from the city's general prohibition. The only way to determine if a sign was the type qualified to receive Menlo Park's favorable treatment was to evaluate the content and substantive message of the sign.

Id.

We then noted that:

> Neither the speaker-nor event-based exemptions implicate *Foti* insofar as neither

> requires law enforcement officers to "read a sign's message to determine if the sign is exempted from the ordinance." *Foti*, 146 F.3d at 636. In the speaker category, officers decide whether an exemption applies by identifying the entity speaking through the sign without regard for the actual substance of the message. In the case of event-based exemptions . the officer must determine only whether a specific triggering event has occurred and if the temporary sign has been erected within the specified time frame.

Id.

[3] Taking these two cases together, we learn that our focus should be on determining whether the ordinance targets certain content; whether the ordinance or exemption is based on identification of a speaker or event instead of on content; and whether an enforcement officer would need to distinguish content to determine applicability of the ordinance.

B. Content-Based Analysis Regarding Qualifying Event Regulation

With these principles in mind, we turn to § 4.402(P), the Qualifying Event provision. Following amendment of the Sign Code, § 4.402(P) reads:

> ***Temporary Directional Signs Relating to a Qualifying Event.*** Temporary Directional Signs Relating to a Qualifying Event shall be permitted subject to the following

regulations:

1. *Size.* Signs shall be no greater than 6 feet in height and 6 square feet in area.

2. *Number.* No more than 4 signs shall be displayed on a single property at any time.

3. *Display.* Signs shall only be displayed up to 12 hours before, during, and 1 hour after the Qualifying Event ends. The person who installed the signs shall be responsible for removal. If the person installing the signs is unknown, the property owner shall be responsible.

4. *Location.* Temporary Directional Signs Relating to a Qualifying Event may be located off-site and shall be placed at grade level. Signs shall be placed only with the permission of the owner of the property on which they are placed.

5. *Prohibited Locations.* Temporary Directional Signs Relating to a Qualifying Event shall not be located:

    a. In the public right-of-way.

    b. On fences, boulders, planters, other signs, vehicles, utility facilities, or any structure.

6. *Construction.* Signs shall be:

    a. Constructed of durable and weather-

resistant materials.

b. Anchored or weighted down to avoid being displaced in windy conditions, or otherwise to be a safety hazard to the public.

[4] Section 4.402(P) regulates physical characteristics, such as size, number and construction of the signs; location of placement; and timing of display. None of these restrictions implicate the content of speech. The only possible content-based aspect of § 4.402(P) is its limitation to signs related to "Qualifying Events." In the Glossary of the amended Code, Temporary Directional Signs Relating to a Qualifying Event are defined as temporary signs intended to direct passersby to a "Qualifying Event," which, in turn, means:

> any assembly, gathering, activity, or meeting sponsored, arranged or promoted by a religious, charitable, community service, educational or other similar non-profit organization.

A directional sign does not contain a message such that regulating directional signs would inherently "distinguish favored speech from disfavored speech on the basis of the ideas or views expressed." *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 643 (1994). The definition of Qualifying Event Signs bears out this observation, as it does not mention any idea or viewpoint, let alone single one out for differential treatment.

[5] The definition of a Qualifying Event sign merely encompasses the elements of "who" is speaking and "what event" is occurring. These two criteria invoke the speaker-based and event-based characteristics approved in *G.K. Limited* because "the City d[id] not limit the substance of [the] speech in any way." 436 F.3d at 1078. In addition to the pole sign ban, the plaintiffs in *G.K. Limited* challenged exemptions in the Lake Oswego sign ordinance. *Id.* at 1070. We concluded the exemptions from the permitting and fee requirements for "public signs, signs for hospital or emergency services, legal notices, railroad signs and danger signs" were speaker-based exemptions that did not relate to the contents of the signs. *Id.* at 1076-77. We reached that conclusion because "officers decide whether an exemption applies by identifying the entity speaking through the sign without regard for the actual substance of the message." *Id* at 1078. Here, an officer can likewise determine whether a "religious, charitable, community service, educational or other similar non-profit organization" is "speaking through the sign" without assessing the substance of the sign's contents.

The plaintiffs in *G.K. Limited* also contested the permit exemption for "temporary signs in residential zones." *Id* at 1070. This exemption allowed homeowners to erect a temporary sign regarding any subject when a triggering event, such as a home sale or election, occurred. We characterized the provision as an event-based exemption that, again, did not relate to the content of the speech. *Id.* at 1078. "In the case of event-based exemptions to the permitting process, the officer must determine only whether a

specific triggering event has occurred and if the temporary sign has been erected within the specified time frame." *Id.* Similarly, for a Qualifying Event Sign, in addition to the content-neutral step of noting the speaker, the Gilbert officer need only check that an event is listed on the sign and the timing of the event. Identifying a triggering event under § 4.402(P) does not entail making a content-based determination. "We have never held, or suggested, that it is improper to look at the content of an oral or written statement in order to determine whether a rule of law applies to a course of conduct." *Hill v. Colorado,* 530 U.S. 703, 721 (2000) (holding that need for officers to sometimes review the contents of oral statements made by "side-walk counselors" to determine whether ordinance limiting speech near health care facilities was violated did not make ordinance content based).

Good News contends that because a Gilbert enforcement officer must review elements of Good News' signs in order to apply § 4.402(P) the section is content based. Surely, however, this regulation is a good example that the "officer must read it" test is not always determinative of whether a regulation is content based or content neutral. The district court indeed recognized that we have "not applied the 'officer must read it test' so strictly that a law must be invalidated any time it forces an officer's eyes to venture within the four corners of the sign." *See Berger,* 569 F.3d at 1052 n. 22 ("Whether an officer must read a message is persuasive evidence of an impermissible content-based purpose, but is not dispositive.") (quoting *Ctr. for Bio-Ethical Reform v. Los Angeles Cty. Sheriff Dep't,* 533 F.3d 780, 789 n.

5) (9th Cir. 2008) (internal quotation marks omitted); *see also ACLU of Nevada v. City of Las Vegas*, 466 F.3d 784, 796 n.12 (9th Cir. 2006) (observing same).

[6] This case also highlights the absurdity of construing the "officer must read it" test as a bellwether of content. If applied without common sense, this principle would mean that every sign, except a blank sign, would be content based. While a Gilbert officer needs to briefly take in what is written on the Qualifying Event Sign to note who is speaking and the timing of the listed event, this "kind of cursory examination" is not akin to an officer synthesizing the expressive content of the sign. *Hill*, 530 U.S. at 721. *See G.K. Ltd.*, 436 F.3d at 1079 (observing that the pole sign grandfather clause "does not require Lake Oswego officials to evaluate the substantive message on the preexisting sign and the clause certainly does not favor speech 'based on the idea expressed' "); *see also, e.g., Covenant Media of South Carolina v. City of North Charleston*, 493 F.3d 421, 434 (4th Cir. 2007) (holding that to the extent enforcement of a sign ordinance similar to Gilbert's that "defined and distinguished between different types of signs," including "directional or instructional signs," required "looking generally at what type of message a sign carries to determine where it can be located, this 'kind of cursory examination' did not make the regulation content based") (quoting *Hill*, 530 U.S. at 721); *La Tour v. City of Fayetteville, Arkansas*, 442 F.3d 1094, 1096 (8th Cir. 2006) (noting that an exception to a sign ordinance's ban on electronic message signs for "time and temperature" signs was

distinguishable from a provision in a prior case regulating political signs, as "[i]t takes some analysis to determine if a sign is 'political,' but one can tell at a glance whether a sign is displaying the time or temperature"). We conclude that § 4.402(P) is not a content-based regulation: It does not single out certain content for differential treatment, and in enforcing the provision an officer must merely note the content-neutral elements of who is speaking through the sign and whether and when an event is occurring.

C. Time, Place, Manner Restrictions

[7] Resolution of content neutrality does not end our inquiry. The sign restriction, as a content-neutral time, place and manner regulation, must also be "narrowly tailored to serve a significant governmental interest, and [must] leave open ample alternative channels for communication of that information.' " *Ward v. Rock Against Racism,* 491 U.S. 781, 791 (1989) (quoting *Clark v. Community for Creative Non-Violence,* 468 U.S. 288, 293 (1984)).[6]

1. Narrow tailoring

We have explained that narrow tailoring to serve a significant governmental interest

---

[6] In *Thomas v. Chicago Park Dist.*, 534 U.S. 316, 323 (2002), the Supreme Court recognized that content-neutral time, place and manner regulations must "contain adequate standards to guide the official's decision and render it subject to effective judicial review." Good News has not claimed that the Sign Code lacks adequate standards for enforcement.

> requires that the regulation actually advance the government's interest, but it need not do so in the least restrictive or least intrusive way. "So long as the means chosen are not substantially broader than necessary to achieve the government's interest the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less speech-restrictive alternative."

G.K. Ltd., 436 F.3d at 1073-74 (quoting *State Univ. of New York v. Fox*, 492 U.S. 469, 479 (1989) (internal citation omitted)). *See also Hill*, 530 U.S. at 726 (emphasizing that "when a content-neutral regulation does not entirely foreclose any means of communication, it may satisfy the tailoring requirement even though it is not the least restrictive or least intrusive means of serving the statutory goal").

[8] Gilbert identifies two interests motivating § 4.402(P): aesthetics and traffic and pedestrian safety. Beauty and safety are familiar players in the free speech skirmishes involving sign ordinances. *See Foti*, 146 F.3d at 637 ("The City's asserted interests in the ordinance are the oft-invoked and well-worn interests of preventing visual blight and promoting traffic and pedestrian safety."). These purposes are readily recognized as significant governmental interests. *See Metromedia v. City of San Diego*, 453 U.S. 490, 507-508 (1981) ("Nor can there be substantial doubt that the twin goals that the ordinance seeks to further—traffic safety and the appearance of the city—are substantial

governmental goals."); *One World One Family Now v. City and County of Honolulu*, 76 F.3d 1009, 1013 (9th Cir. 1996) ("Cities have a substantial interest in protecting the aesthetic appearance of their communities by 'avoiding visual clutter' [and] assuring safe and convenient circulation on their streets.") (quoting *Vincent*, 466 U.S. at 806–07). Gilbert's identification in the Code of the recognized interests in safety and aesthetics "is all our review requires to prove a significant interest." *Get Outdoors II v. City of San Diego*, 506 F.3d 886, 893-94 (9th Cir. 2007).

[9] In assessing § 4.402(P)'s tailoring, the district court credited Gilbert's contention that "it ha[d] taken steps to ensure that Plaintiffs' speech is not overly restricted." The restrictions on time, place and manner imposed by Gilbert on the display of Qualifying Events Signs would indeed appear to "actually advance" the aesthetic and safety interests by limiting the size, duration and proliferation of signs. *See G.K. Ltd.*, 436 F.3d at 1073. These measures restricting the number of signs and limiting them to private property do not appear substantially broader measures than required to make sure the rights-of-way are not so thicketed with signs as to pose a safety hazard or create an aesthetic blight. The limitation on timing—twelve hours before the event and one hour after—is equally narrowly tailored to meet these interests. While it might be easier and provide broader exposure for Good News to have the sign up for twenty-four hours, the test is not convenience or optimal display. *See Hill*, 530 U.S. at 727 (noting when reviewing a Colorado ordinance limiting

"sidewalk counseling" that "whether or not the 8–foot interval is the best possible accommodation of the competing interests at stake, we must accord a measure of deference to the judgment of the Colorado legislature.") The district court did not abuse its discretion in concluding § 4.402(P) is narrowly tailored, as it "does not sweep in more speech than is necessary to achieve the Town's aesthetic and traffic control objectives."

2. Ample alternative channels for communication

Good News contends that § 4.402(P) leaves it without adequate channels to communicate its message inviting passersby to attend church services. The district court found that "Plaintiffs' alternative channels of communication include distributing leaflets, sending email messages or mail advertisements, walking the sidewalks with signs advertising the church services, posting signs carrying religious messages on their own property, and advertising in the newspaper, phonebook or other print media."

[10] On appeal, Good News responds that displaying Qualifying Event Signs is the most effective way of communicating its invitation, and claims that when it placed more signs it attracted more congregants. Again, the test is not whether another option would be more optimal for Good News: "[W]e are cautioned against invalidating government regulations for failing to leave open ample alternative channels unless the regulations foreclose[s] 'an entire medium of public expression

across the landscape of a particular community or setting.' " *G.K. Ltd.*, 436 F.3d at 1074 (quoting *Colacurcio v. City of Kent*, 163 F.3d 545, 555 (9th Cir. 1998)).[7] While the alternative options identified by the district court may not be Good News' preference, "we cannot invalidate the Sign Code merely because it restricts plaintiffs' preferred method of communication." *G.K. Ltd.*, 436 F.3d at 1074. Nor do the alternative modes available appear especially burdensome. The district court did not abuse its discretion by finding that the "alternative channels of communication [it listed] ensure that Plaintiffs are able to 'communicate effectively' with members of the public."

[11] Section 4.402(P) is a content-neutral regulation of the time, place and manner of display of Good News' Qualifying Event Signs; the provision is narrowly tailored to further Gilbert's significant interests in aesthetics and traffic safety; and Good News has ample alternative channels of communicating its invitation to church services. The district court did not err in concluding that Good News was unlikely to succeed in demonstrating § 4.402(P) is unconstitutional because it is a content-

---

[7] *Ladue* provides a worthwhile contrast. The City of Ladue banned homeowners from displaying signs on their properties, except for certain identification and for sale signs. 512 U.S. at 45. The Supreme Court concluded that displaying a sign at one's home endows the sign with special meaning, and that "[i]n this case, we are not persuaded that adequate substitutes exist for the important medium of speech that Ladue has closed off." *Id.* at 56 (internal citation omitted). Here, Gilbert has not foreclosed the entire medium of temporary signs, and has left open a number of reasonable substitutes for Good News to communicate its message.

based regulation that does not survive strict scrutiny.

II. Sign Code's Treatment of Commercial Speech versus Noncommercial Speech

[12] Municipalities stray beyond the boundaries of acceptable time, place and manner regulation when an ordinance favors commercial forms of speech over noncommercial speech. *In Metromedia*, the Supreme Court tackled this issue in the context of San Diego's billboard ordinance, which permitted on-site commercial advertising, but forbade off-site commercial billboards and all noncommercial billboards. 453 U.S. at 495-96 (plurality opinion). The Court invalidated the ordinance, emphasizing that San Diego's priorities were topsy-turvy, as "our recent commercial speech cases have consistently accorded noncommercial speech a greater degree of protection than commercial speech." *Id.* at 513. In *National Advertising v. City of Orange*, 861 F.2d 246 (9th Cir. 1988), we echoed the lesson from *Metromedia*: "Merely treating noncommercial and commercial speech equally is not constitutionally sufficient. The First Amendment affords greater protection to noncommercial than to commercial expression. Regulations valid as to commercial speech may be unconstitutional as to noncommercial." *Id.* at 248 (internal citations omitted).[8]

---

[8] *See also Berger*, 569 F.3d at 1055 (holding invalid an ordinance that restricts speech within 30 feet of a "captive audience" in a public park, but excepts concessionaires: "First, the rule's preference for concessionaires and licensees leads to the odd result that purely commercial speech, which receives

[13] Good News argues that the Sign Code advantages commercial speech over the noncommercial speech found in Qualifying Event Signs. The district court concluded, however, that Good News' "noncommercial speech enjoys fewer restrictions than its commercial counterparts." The court performed a careful comparison of the restrictions placed on Qualifying Event Signs versus "Weekend Directional Signs" for subdivision sales, the commercial speech showcased by Good News as receiving more favorable treatment.[9] The district court concluded that Qualifying Event Signs come out on top as the total number of Qualifying Event Signs allowed is greater; Qualifying Event Signs may be placed during week-days as well as weekends; the size allowed for Qualifying Events Signs is greater; and although the Qualifying Events Signs may not be placed in rights-of-way, they are not restricted to a two-mile radius from the event. Of "paramount importance" to the court was the fact that no permit is required to display a Qualifying Events Sign, in contrast to the permit required for

---

more limited First Amendment protection than noncommercial speech, is allowed and encouraged, while artistic and political speech is not. This bias in favor of commercial speech is, on its own, cause for the rule's invalidation.").

[9] A Weekend Directional Sign is a "temporary off-site sign directing motorists to a developing subdivision." § 4.405(B)(2). According to the Code, fifteen Weekend Directional Signs may be permitted to each subdivision plat, and the signs may be placed within two miles of the subdivision perimeter, including in public rights-of-way. The signs may be no greater than four feet high and three feet square; they may be installed after 6:00 p.m. on Friday and must be removed by 8:00 a.m. the following Monday. *Id.*

the Weekend Directional Signs. The district court did not abuse its discretion in concluding, after close examination, that the Sign Code does not favor commercial speech over non-commercial speech, and denying a preliminary injunction on that basis. *Cf. Beaulieu v. City of Alabaster*, 454 F.3d 1219, 1233 (11th Cir. 2006) (invalidating sign ordinance that made it "easier, cheaper, and faster for [the plaintiff] to post a real estate sign than a campaign sign," and thereby discriminated against noncommercial speech in favor of commercial speech).

III. Sign Code's Treatment of Different Forms of Noncommercial Speech

[14] Not only must a municipality refrain from favoring commercial over noncommercial speech, it also may not favor certain noncommercial speech over other noncommercial speech without facing stricter review. In *Metromedia*, the Supreme Court warned against such an approach: "Although the city may distinguish between the relative value of different categories of commercial speech, the city does not have the same range of choice in the area of noncommercial speech to evaluate the strength of, or distinguish between, various communicative interests." 453 U.S. at 514.

We heeded *Metromedia*'s warning in *National Advertising Co. v. City of Orange*. The City of Orange imposed a general ban on offsite signs, with exceptions for "certain governmental signs and flags, memorial tablets, recreational signs, and temporary political, real estate, construction, and advertising signs." 861 F.2d at 247. We concluded that, through

its exemptions, Orange made content-based distinctions among categories of noncommercial speech, and invalidated the ordinance as to noncommercial speech. *Id.* at 250. *Compare Nat'l Advert. Co. v. Town of Babylon,* 900 F.2d 551, 557 (2d Cir. 1990) (holding that sign ordinance's exceptions to sign ban for temporary political signs and signs identifying parades, festivals, and other similar occasions "impermissibly discriminate between types of noncommercial speech based on content") *with Messer v. City of Douglasville, Georgia,* 975 F.2d 1505, 1513 (11th Cir. 1992) (holding exemptions in sign code from permitting requirement are not unconstitutional and noting they are more limited than the exemptions in *Metromedia* or *City of Orange*; do not "express a preference between non-commercial messages;" and do not include "specific exemptions for political, historical, religious or special event signs").

Good News argues that the Sign Code makes distinctions between Qualifying Event Signs and other forms of noncommercial speech, thereby impermissibly favoring some noncommercial speech. A preliminary review of the nineteen exemptions to the permit requirement reveals several categories related to noncommercial speech. For example, an "Ideological Sign" is defined as "[a] sign communicating a message or ideas for non-commercial purposes that is not a construction sign, directional sign, temporary directional sign relating to a qualifying event, political sign, garage sale sign, or a sign owned or required by a governmental agency." § 4.402(J). In other words, an Ideological Sign includes a message or idea that is distinct from

a Political Sign that supports a candidate or ballot measure or from a Qualifying Event Sign.

[15] Although Ideological Signs, Political Signs, and Qualifying Event Signs are all exempted from the Sign Code's permit requirement, and treated favorably under the Code in that respect, each category faces different restrictions and requirements. The district court carefully analyzed the other First Amendment challenges, but did not address whether Good News is likely to succeed on the merits of its claim that § 4.402(P) impermissibly discriminates among certain forms of noncommercial speech. On remand, the district court will have the opportunity to determine whether Gilbert impermissibly "evaluate[d] the strength of, or distinguished between, various [noncommercial] communicative interests." *Metromedia,* 453 U.S. at 514.

CONCLUSION

Because § 4.402(P) is a content-neutral regulation that passes muster and because it does not impermissibly favor commercial speech over noncommercial speech, we affirm the denial of a preliminary injunction on those First Amendment and Equal Protection claims. We remand for the district court to consider the First Amendment and Equal Protection claims that the Sign Code is unconstitutional in favoring some noncommercial speech over other noncommercial speech.

AFFIRMED in part, REMANDED in part. Each party shall bear its own costs on appeal.

Filed: September 30, 2008

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Pastor Clyde Reed; and Good News Community Church, Plaintiffs, vs. Town of Gilbert, Arizona; and Adam Adams in his official capacity as Code Compliance Manager, Defendants.	)	Case No. CV-07-0522-PHX-SRB **ORDER**

Pending before the Court is Pastor Clyde Reed and the Good News Community Church's (the "Plaintiffs") Second Motion for Preliminary Injunction (Doc. 26), seeking to enjoin the Town of Gilbert (the "Town") from enforcing § 4.402P of its amended Sign Regulations ("Sign Code") against Plaintiffs on the grounds that it is unconstitutional.

I. BACKGROUND

Good News Community Church met at Coronado Elementary School for almost five years prior to the filing of Plaintiffs' original Complaint. (Am. Compl. ¶ 52.) For some time, Plaintiffs placed about seventeen signs in the area to direct the public to

their services. (Am. Compl. ¶ 53.) On July 14, 2005, Plaintiffs received a citation from the Town's Code Compliance Department for violating a provision of § 4.402P of the Town's Sign Code that prohibited Plaintiffs from displaying temporary directional signs more than two hours before their event and one hour following the conclusion of the event. (Am. Compl. ¶ 56, Ex. 5.) On September 17, 2005, the Town's Code Compliance Department again cited Plaintiffs for violations of § 4.402P. (Am. Compl. ¶ 55, Ex. 4.) The citation stated that Plaintiffs had violated the "Display" requirement of § 4.402P by exceeding the time limits for displaying their signs and failing to include the date of the event. (Am. Compl. ¶ 55, Ex. 4.) Concerned about continuing enforcement of the Sign Code, Plaintiffs contacted the Town's Code Compliance Department to try to reach some sort of accommodation, but were told that they would continue to be cited if they posted signs in violation of § 4.402P. (Am. Compl. ¶¶ 60–64.)

Plaintiffs filed their original Complaint against the Town and Adam Adams, the Town's Code Compliance Manager, on March 8, 2007, challenging the constitutionality of § 4.402P of the Sign Code. (Am. Compl. ¶ 64.) Soon thereafter, on March 30, 2007, Plaintiffs filed a Motion for Preliminary Injunction asking the Court to enjoin Defendants from enforcing § 4.402P against Plaintiffs. (Doc. 8.) Following Plaintiffs' motion, the parties stipulated to a preliminary injunction prohibiting enforcement of § 4.402P of the Sign Code against Plaintiffs. (Am. Compl. ¶¶ 65–66.) The Court entered its Order

enjoining the Town from enforcing § 4.402P against Plaintiffs on May 9, 2007. (Doc. 19.)

The Town passed amendments to its Sign Code on January 8, 2008. (Am. Compl. ¶¶ 67–76.) Prior to passing the amendments, the parties' attorneys telephonically discussed the amendments and Plaintiffs' attorney informed the Town's attorney that Plaintiffs believed the amended code suffered the same constitutional defects as the original. (Am. Compl. ¶69.) On January 10, 2008, after the amendments to the Town's Sign Code were passed, Plaintiffs filed a Motion for Leave to File Amended Verified Complaint, and lodged their Amended Complaint. (Docs. 23, 24.) The Amended Complaint alleges that the amended Sign Code, particularly § 4.402P, infringes Plaintiffs' constitutional rights because, (1) it violates the Free Speech Clause of the First Amendment (Am. Compl. ¶¶ 83–105); (2) it violates the Equal Protection Clause of the Fourteenth Amendment (Am. Compl. ¶¶ 98–105); (3) it violates the Free Exercise Clause of the First Amendment (Am. Compl. ¶¶ 106–21); and (4) it violates the Arizona Religious Freedom Restoration Act (Am. Compl. ¶¶ 122–38). Concurrent with the lodging of the Amended Complaint, Plaintiffs filed their Second Motion for Preliminary Injunction. (Doc. 26.) Plaintiffs' Second Motion for Preliminary Injunction argues that Plaintiffs are entitled to injunctive relief based on their Free Speech Clause and Equal Protection Clause claims. Plaintiffs have reserved their Free Exercise Clause and Arizona Religious Freedom Restoration Act claims for future stages of this litigation. (Prelim. Inj. Hr'g Tr. ("Hr'g Tr.") 31:23–32:8.)

The Court granted Plaintiffs' Motion to Amend the Complaint and, on February 12, 2008, the Amended Complaint was filed. (Doc. 32.) The Town filed its Response to Plaintiffs' Second Motion for Preliminary Injunction on February 8, 2008, and Plaintiffs filed their Reply on February 15, 2008. (Docs. 30, 33.)

On March 24, 2008, the Court heard oral argument on Plaintiffs' Second Motion for Preliminary Injunction. At the end of the hearing, the Court inquired whether the matter could be resolved through a permanent injunction rather than a preliminary injunction, and ordered the parties to file memoranda detailing what discovery, if any, would be required to move to a permanent injunction. (Hr'g Tr. 30:24–31:19.) Plaintiffs filed their memorandum addressing the discovery issue on April 3, 2008 and Defendants filed their memorandum on April 7, 2008.

A. The Sign Code

The Town of Gilbert Land Development Code, Division 4, General Regulations, Article 4.4, Sign Regulations, controls the posting of signs within the Town of Gilbert.[1] (Am. Compl., Exs. 1, 2.) Section

---

[1]Unless otherwise noted, the Sign Code referenced in this Order is the amended Sign Code, adopted January 8, 2008. Exhibit 1 to the Amended Complaint is the original Sign Code, and the record does not include a complete copy of the amended Sign Code. Exhibit 2 contains the limited changes made to the original Sign Code, which are constrained, in substantial part, to § 4.402P of the Sign Code. This section, re-named "Temporary Directional Signs Relating to a Qualifying Event"

4.401A outlines the purposes of the Sign Code, namely, to "assure proper and efficient expression through visual communications involving signs compatible with the character and environment of the Town; to eliminate confusing, distracting, and unsafe signs; and to enhance the visual environment of the Town of Gilbert." Section 4.401A also lists the reasons why Defendants believe that the regulation of signs is necessary and in the public interest.[2] (Am. Compl., Ex. 1 at 1–2.)

---

from the earlier version, "Religious Assembly Temporary Directional Signs," contains the bulk of the amendments. Also amended were the sections of the Sign Code's Glossary defining "Temporary Directional Signs Relating to a Qualifying Event," and "Ideological Signs," as well as § 4.402D, concerning "Signs Not Requiring a Permit," under which "Temporary Directional Signs Relating to a Qualifying Event" is now listed. (Am. Compl., Ex. 2.)

[2]Section 4.401A provides:

> The regulation of signs within the Town of Gilbert is necessary and in the public interest for the following reasons:
>
> 1. To promote and aid the public and private sectors in the identification, location, and advertisement of goods and services.
> 2. To preserve the beauty and the unique character of the Town of Gilbert and to protect the Town against visual blight.
> 3. To protect property values within the Town of Gilbert by assuring the compatibility of surrounding land uses.
> 4. To promote general safety and protect the general public from damage or injury caused by, or partially attributed to, the distractions, hazards, and obstructions

Under § 4.402A, no person may "construct, install, attach, place, paint, alter, relocate, or otherwise maintain any sign in the Town without first obtaining a sign permit" unless the sign is one exempted under § 4.402D. Section 4.402D lists nineteen different types of signs that are allowed without a permit. These include, among others, § 4.402P, "Temporary Directional Signs Relating to a Qualifying Event "; § 4.402I, "Political Signs"; and § 4.402J, "Ideological Signs." (Am. Compl., Ex. 1 at 2–3.)

Section 4.402P, concerning Temporary Directional Signs Relating to a Qualifying Event, provides, in relevant part:

> Temporary Directional Signs Relating to a Qualifying Event shall be permitted subject to the following regulations:

---

which result from improperly designed or located signs.

5. To promote the general welfare and to provide a pleasing environmental setting and community appearance which are vital to the continued economic development of the Town.
6. To make signs compatible with overall Town design objectives which are important in attracting new residents and business to the community.
7. To make signs readable to the user in a clear, unambiguous, and concise manner.
8. To ensure signs are clear and compatible with the planned character of the adjacent architecture and neighborhoods, and to provide the essential identity of, and direction to facilities in the community.

1. *Size*. Signs shall be no greater than 6 feet in height and 6 square feet in area.
2. *Number*. No more than 4 signs shall be displayed on a single property at any one time.
3. *Display*. Signs shall only be displayed up to 12 hours before, during, and 1 hour after the qualifying event ends. The person who installed the signs shall be responsible for removal. If the person installing the signs is unknown, the property owner shall be responsible.
4. *Location*. Temporary Directional Signs Relating to a Qualifying Event may be located off-site and shall be placed at grade level. Signs shall be placed only with the permission of the owner of the property on which they are placed.
5. *Prohibited Locations*. Temporary Directional Signs Relating to a Qualifying Event shall not be located:
   a. In the public right-of-way.
   b. On fences, boulders, planters, other signs, vehicles, utility facilities, or any structure.

The Sign Code's Glossary of General Terms defines Temporary Directional Signs Relating to a Qualifying Event" as "a temporary sign intended to direct pedestrians, motorists, and other passersby to a 'qualifying event,'" and a "Qualifying Event" as

"any assembly, gathering, activity, or meeting sponsored, arranged, or promoted by a religious, charitable, community service, educational, or other similar non-profit organization." (Am. Compl., Ex. 2 at 3). A "Political Sign" is defined as "[a] temporary sign which supports candidates for office or urges action on any other matter on the ballot of primary, general and special elections relating to any national, state or local election." (Am. Compl., Ex. 3 at 21–22.) An "Ideological Sign" is "[a] sign communicating a message or ideas for non-commercial purposes that is not a construction sign, directional sign, temporary directional sign relating to a qualifying event, political sign, garage sale sign, or a sign owned or required by a governmental agency." (Am. Compl., Ex. 2 at 3.)

In addition to Temporary Directional Signs Relating to a Qualifying Event, there are two other types of temporary signs highlighted by Plaintiffs: "Weekend Directional Signs," § 4.405B(2), and "Homeowners Association Facilities Temporary Signs," § 4.406C(3). Section 4.405B(2), provides, in relevant part:

> Weekend directional signs shall comply with the following regulations:
>
> a. Applicability. Weekend Directional Signs shall only be approved for new construction in a residential subdivision within the Town.
>
> b. Term. A sign permit for Weekend Directional Signs is valid for 1 year from the date of issuance or until the model home complex is permanently closed,

whichever occurs first. The sign permit may be renewed annually.

c. Quantity. A total of 15 Weekend Directional Signs may be permitted for each recorded subdivision plat.

d. Size. Signs shall be no greater than 4 feet in height and 3 square feet in area.

e. Location. Weekend Directional Signs shall be located within a 2 mile radius of the subdivision perimeter.

f. Installation and Removal. Weekend Directional Signs shall be installed no earlier than 6:00 p.m. on Friday of each week and shall be removed no later than 8:00 a.m. on the following Monday. Signs shall be installed no earlier than 6:00 p.m. preceding any official U.S. holiday and shall be removed by 8:00 a.m. the day following the holiday, or Monday if the holiday occurs on Friday.

g. Spacing. Individual signs shall be located a minimum of 40 feet from any other Weekend Direction Sign, regardless of the builder. No more than 5 Weekend Directional Signs shall be located within any 500 foot length on the same side of a street, regardless of the builder.

i. Label. The back of each individual sign shall contain in clear, legible form the current sign permit number, the builder's name, and the sign company's name and phone number in letters at least 1 inch in height.

j. Prohibited Locations. Weekend Directional Signs shall not be placed:
(1) In the center median of any street; or
(2) Within 10 feet of the pavement edge of any street where no curb exists; or
(3) Within 2 feet of the face of curb where a curb exists; or
(4) On or closer than 3 feet from any vehicle, fire hydrant, light or traffic signal pole, traffic sign, bench, bus stop, tree, utility box, or any similar feature.
(5) On any property without written permission of the owner or person in control of the property.

Section 4.406C(3), provides, in relevant part:

Temporary Signs for Homeowners Association Facilities shall comply with the following regulations:

a. Applicability. Banners and Directional Signs for Homeowners Association Facilities are permitted that display information concerning seasonal or temporary events occurring in the development.
b. Sign Area and Location. A maximum of 80 square feet of sign area is permitted within the limits of the residential community.
c. Installation and Removal. Signs shall be installed no earlier than 30 days prior to the date of an event and shall be removed within 48 hours of completion of the event.

e. Placement. The regulations of Section 4.402: General Sign Regulations and Section 4.403.C: Placement of Signs shall apply.

II. LEGAL STANDARDS AND ANALYSIS

A moving party is entitled to preliminary injunctive relief if it is able to satisfy one of two alternative tests. Under the first test, the party must "demonstrate 'either: (1) a likelihood of success on the merits and the possibility of irreparable injury; or (2) that serious questions going to the merits were raised and the balance of hardships tips sharply in [their] favor.'" *Sw. Voter Registration Educ. Project v. Shelly*, 344 F.3d 914, 918 (9th Cir. 2003) (quoting *Clear Channel Outdoor Inc. v. City of L.A.*, 340 F.3d 810, 813 (9th Cir. 2003) (quoting *Walczak v. EPL Prolong, Inc.*, 198 F.3d 725, 731 (9th Cir. 1999))). As an additional factor in this first test, "[t]he district court must also consider whether the public interest favors issuance of the injunction." *Id.* The second test provides for preliminary injunctive relief if the moving party is able to "'establish (1) a strong likelihood of success on the merits, (2) the possibility of irreparable injury to plaintiff if preliminary relief is not granted, (3) a balance of hardships favoring the plaintiff, and (4) advancement of the public interest (in certain cases).'" *Id.* (quoting *Johnson v. Cal. State Bd. of Accountancy*, 72 F.3d 1427, 1430 (9th Cir.1995) (internal quotation marks omitted)). This second test operates on a sliding scale: as the likelihood of success on the merits becomes stronger,

the degree to which the balance of hardships must tip in favor of the moving party decreases. *Id.*

A. Free Speech Clause of the First Amendment

The First Amendment states that "Congress shall make no law abridging the freedom of speech." Through the Fourteenth Amendment, this rule is equally applicable to municipal governments. *See Members of the City Council of the City of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 792 n.2 (1984). As a medium of communication, signs present unique challenges to municipal governments that have the unenviable task of balancing citizens' right to speak with the detrimental effects that unregulated proliferation of signs would present. The Supreme Court has eloquently expounded on this general idea:

> While signs are a form of expression protected by the Free Speech Clause, they pose distinctive problems that are subject to municipalities' police powers. Unlike oral speech, signs take up space and may obstruct views, distract motorists, displace alternative uses for land, and pose other problems that legitimately call for regulation. It is common ground that governments may regulate the physical characteristics of signs.

City of Ladue v. Gilleo, 512 U.S. 43, 48 (1994). Over the years, cases have made clear that the First Amendment permits some regulation of speech so

long as the government does not do so "in ways that favor some viewpoints or ideas at the expense of others." *Vincent*, 466 U.S. at 804.

Plaintiffs' directional signs fall within the category of protected speech,[3] and the Town has limited Plaintiffs' ability to communicate their protected message. "'But to say the ordinance presents a First Amendment issue is not necessarily to say that it constitutes a First Amendment violation.'" *Vincent*, 466 U.S. at 803-04 (quoting *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 561(1981)). And so, since the Town's ordinance imposes limits on Plaintiffs' protected speech, the first step is to determine whether the ordinance is content-based or content-neutral.

1. Content Neutrality

"'As a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based.'" *Foti v. City of Menlo Park*, 146 F.3d 629, 636 (9th Cir. 1998) (quoting *Turner Broad. Sys. v. F.C.C.*,

---

[3] In the Introduction section of their Response, Defendants suggest that Plaintiffs' signs are not religious speech because they fail to carry a religious message. (Defs.' Resp. to Pls.' Second Mot. for Prelim. Inj. ("Resp.") at 2–3.) Although Defendants may not understand the signs to convey a religious message, they are mistaken. By directing passersby to the "Good News Community," Plaintiff is invoking the *good news* which, according to Plaintiffs, is "the message of Jesus or the message about Jesus, specifically his resurrection." (Pls.' Reply to Defs.' Resp. to Second Mot. for Prelim. Inj. ("Reply") at 3.) It is beyond dispute that Plaintiffs' signs communicate a religious message.

512 U.S. 622, 643 (1994)). "Content-based regulations are presumptively unconstitutional." *Id.* at 637 (citing *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992)). If an ordinance is content-based, then it is subject to strict scrutiny, and the government is required "to show that the 'regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.'" *Boos v. Barry*, 485 U.S. 312, 321 (1988) (quoting *Perry Educ. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 45 (1983)). Alternatively, a content-neutral regulation need only satisfy "an intermediate level of scrutiny." *Turner*, 512 U.S. at 642. To satisfy this intermediate level of scrutiny, a court must "determine whether the [c]ode is narrowly tailored to achieve significant government interests and leaves open ample alternative channels for communication." *G.K. Ltd. Travel v. City of Lake Oswego*, 436 F.3d 1064, 1079 (9th Cir. 2006).

"A law is content-based rather than content-neutral if 'the main purpose in enacting it was to suppress or exalt speech of a certain content, or it differentiates based on the content of speech on its face.'" *Long Beach Area Peace Network v. City of Long Beach*, 522 F.3d 1010, 1022–23 (9th Cir. 2008) (quoting *ACLU of Nevada v. City of Las Vegas*, 466 F.3d 784, 793 (9th Cir. 2006)). However, a court is not required "to find a content-based purpose in order to hold that a regulation is content-based." *ACLU of Nevada*, 466 F.3d at 793. As a general rule, the Ninth Circuit has held that "[a]n ordinance is content-based if 'a law enforcement officer must read a [sign's] message to determine if the [sign] is exempted from the ordinance.'" *Id.* at 795–96

(quoting *Foti*, 146 F.3d at 636); *Desert Outdoor*, 103 F.3d at 820 ("Because the exemptions require City officials to examine the content of noncommercial signs to determine whether the exemption applies, the City's regulation of noncommercial speech is content-based.").

However, as the *ACLU of Nevada* court acknowledged, the Ninth Circuit has not applied the "officer must read it test" so strictly that a law must be invalidated any time it forces an officer's eyes to venture within the four corners of a sign. 466 F.3d at 796 n.12. Instead, the *ACLU of Nevada* court explained, there are situations where an officer must look at a sign, but need not "'evaluate the substantive message' of [the] communication." *Id.* (quoting *G.K. Ltd.*, 436 F.3d at 1079). In *G.K. Limited* the court examined a "grandfather clause" that required enforcement officials to "read [the] sign's message and determine whether there has been a change of logo and/or message upon the face of the sign or if the sign has otherwise been altered." *G.K. Ltd.*, 436 F.3d at 1078 (internal quotation marks omitted). Explaining why the "officer must read it test" did not invalidate the provision, the court wrote: "even those who speak no English could perform this superficial review function by placing the former sign next to the new sign and examining the characters and elements on both." *Id.* at 1079. Ultimately, the *G.K. Limited* court "refused 'to broaden *Foti* to stand for the proposition that any time an ordinance requires a law enforcement officer to read a sign, the ordinance must be content-based.'" *ACLU of Nevada*, 466 F.3d at 796 n.12 (quoting *G.K. Ltd.*, 466 F.3d at 1078).

Here, Plaintiffs argue that § 4.402P is content-based because a law enforcement officer must examine the content of a sign to determine whether it is covered by § 4.402P of the Sign Code. The Court disagrees. First, Plaintiffs contend that an officer would have to read Plaintiffs' signs so as not to confuse them with political or ideological signs, which are regulated under separate sections of the Sign Code. This argument is unavailing because an officer need not read Plaintiffs' sign at all—the officer would only have to note that the sign contained an address, some directional marking, and a date and time of an event. Simply noting the presence of these elements would alert the officer that he was dealing with a Temporary Directional Sign Relating to a Qualifying Event. No additional inquiry would be required, and it would be wholly unnecessary to read a single word printed on the sign.

Next, Plaintiffs claim that an officer would have to read their signs to distinguish between the various temporary directional signs regulated under the Sign Code, namely Weekend Directional Signs and Homeowners Association Facilities Temporary Signs. However, Temporary Directional Signs Relating to a Qualifying Event, unlike Weekend Directional Signs and Homeowners Association Facilities Temporary Signs, do not require a permit. Thus, an officer charged with enforcement of the Sign Code will be aware of those signs that have permits, and those that do not. Any temporary directional sign that does not have a permit must, therefore, fall under the coverage of § 4.402P, Temporary Directional Signs Relating to a

Qualifying Event, thereby eliminating the need to review the content of the temporary directional sign.

The situation presented by this case closely tracks the facts presented in *G.K. Limited,* and similar reasoning is warranted. As was the case in *G.K. Limited*, a law enforcement officer does not need to review the *substance* of the sign to determine whether it is regulated under § 4.402P. *See* 436 F.3d at 1078–79. Where the only way to determine whether a sign falls within the ambit of a particular ordinance is to "evaluate the content and substantive message of the sign," the ordinance is content-based. *Id.* at 1078. Such a review is unnecessary in this case, and, for that reason, § 4.402P is a content-neutral regulation of speech.

2. Intermediate Scrutiny

To assess whether a content-neutral sign code is a permissible restriction of speech, a court must "determine whether the [c]ode is narrowly tailored to achieve significant government interests and leaves open ample alternative channels for communication." *G.K. Ltd.*, 436 F.3d at 1079.

a. Significant Interests

The Town argues that it has significant interests, including "its obligation to protect the health, safety, and welfare of its citizens, including a substantial and legitimate interest in regulating signs that pose a traffic safety threat or cause visual blight," that justify the restrictions found in its Sign Code. (Resp. at 8.) "It is well settled that [a

municipality] may legitimately exercise its police powers to advance esthetic values." *Vincent*, 466 U.S. at 805; *G.K. Ltd.*, 436 F.3d at 1079 ("the City's interests in regulating speech to preserve aesthetics and protect traffic and traveler safety are significant."). The Town's interests in enacting § 4.402P are significant.

b. Narrow Tailoring

A regulation is narrowly tailored "so long as the regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989) (quoting *United States v. Albertini*, 472 U.S. 675, 689 (1985)). Under this standard, a regulation may not "burden substantially more speech than is necessary to further the government's legitimate interests." *Id.* Here, the Town argues that it has taken steps to ensure that Plaintiffs' speech is not overly restricted. In this regard, the Town explains that the number of signs allowed (up to four on any single private property with an unlimited number permitted), the size (up to six square feet), and the duration (twelve hours before and one hour after the event) are no more restrictive than necessary to achieve the Town's significant interests. The Town contends that the nature of the temporary signs coupled with the purpose of the signs—to direct the public to an event—renders such signs meaningless if they are posted far outside the time range of the triggering event. The Court finds these justifications reasonable, and agrees that § 4.402P does not sweep

in more speech than is necessary to achieve the Town's aesthetic and traffic control objectives.

Furthermore, absent these restrictions, or some other similar restrictions, it would be difficult for the city to further its significant interests. Of course, there are other reasonable restrictions that could be written into § 4.402P, but the constitutionality of § 4.402P "'does not turn on a judge's agreement with the responsible decisionmaker concerning the most appropriate method for promoting significant government interests' or the degree to which those interest should be promoted." *Id.* at 800 (quoting *Albertini*, 472 U.S. at 689).[4]

c. Alternative Channels

If an ordinance eliminates or restricts a medium of speech in a way that interferes with the speaker's ability to "communicate effectively," then the regulation cannot survive intermediate scrutiny. *G.K. Ltd.*, 436 F.3d at 1080 (quoting *Vincent*, 466 U.S. at 812). Plaintiffs' alternative channels of communication include distributing leaflets, sending email messages or mail advertisements, walking the

---

[4] Plaintiffs argue that the Sign Code's treatment of political signs, which may be posted in the public right-of-way, undermines the Town's argument that it has enacted § 4.402P for aesthetic purposes. Essentially, Plaintiffs believe that if the Town does not completely ban signs in the public right-of-way, it loses its police power to beautify public spaces. The Town is perfectly justified in its decision to allow some signs to be posted in public spaces, while prohibiting others, so long as it does so without regard to content. See *Vincent*, 466 U.S. at 811 ("Even if some visual blight remains, a partial, content-neutral ban may nevertheless enhance the City's appearance.").

sidewalks with signs advertising the church services, posting signs carrying religious messages on their own property, and advertising in the newspaper, phonebook, or other print media. These alternative channels of communication ensure that Plaintiffs are be able to "communicate effectively" with members of the public, and there is no evidence to suggest that by failing to expand or eliminate the restrictions of § 4.402P, the Town is interfering with a "uniquely valuable or important mode of communication." *Id.* (quoting *Vincent*, 466 U.S. at 812).

3. Commercial-Noncommercial Speech Distinction

"'[A]n ordinance is invalid if it imposes greater restrictions on noncommercial than on commercial [signs].'" *G.K. Ltd.*, 436 F.3d at 1081 (quoting *Nat'l Adver. Co. v. City of Orange*, 861 F.2d 246, 248 (9th Cir. 1988) (citing *Metromedia*, 453 U.S. at 513)). Plaintiffs argue that certain sections of the Sign Code, namely those that apply to "Weekend Directional Signs" and "Homeowners Association Facilities Temporary Signs," allow additional freedom in size, duration, and location than those for "Temporary Directional Signs Relating to a Qualifying Event," in effect burdening noncommercial speech more than commercial speech. (Pls.' Second Mot. for Prelim. Inj. ("Mot.") at 11-12.) Plaintiffs' perceived subordinate position to the aforementioned commercial provisions is, on closer examination, inaccurate as Plaintiffs' noncommercial speech enjoys fewer restrictions than its commercial counterparts.

Plaintiffs focus their comparison of the commercial and noncommercial provisions on § 4.405B(2), "Weekend Directional Signs" (detailed in Section I, A *supra*). Plaintiffs write, "a builder is permitted to erect 15 signs per subdivision advertising properties for sale, can display these signs from 6:00 p.m. Friday until 8:00 p.m. Monday, and may place these signs in rights-of-way." (Mot. at 12.) Before comparing the commercial and noncommercial regulations, Plaintiffs' statement requires clarification on two accounts: Weekend Directional Signs must be removed by 8:00 a.m., not 8:00 p.m., and are not unconditionally permitted in the rights-of-way. (*See* § 4.405B(2), *supra*.) Each of these commercial restrictions, when compared to the provisions of § 4.402P, prove more restrictive, not, as Plaintiffs contend, the other way around.

The "Number" limitation of § 4.402P permits four signs per property, but an unlimited number of signs overall. In comparison, the "Quantity" limitation of § 4.405B(2) allows a maximum of fifteen signs per recorded subdivision plat. In the Court's view, § 4.405B(2) is more restrictive as it limits the overall number of signs to fifteen, while Plaintiffs could easily exceed this number of signs by placing their signs on at least four separate properties. Furthermore, all of these signs may be placed within the same subdivision plat, if Plaintiffs so choose. Next, Plaintiffs point to the "Display" provision of § 4.402P which permits Plaintiffs to post their signs "up to 12 hours, before, during, and 1 hour after the qualifying event ends," and contrast this with the "Installation and Removal" restriction in § 4.405B(2) which states that "signs shall be installed no earlier

than 6:00 p.m. on Friday of each week and shall be removed no later than 8:00 a.m. on the following Monday." Again, the Court finds that § 4.405B(2)'s restriction is more severe. Section 4.405B(2) restricts commercial users to posting sings on the weekends, as opposed to Plaintiffs who, if they were so inclined, could stage a qualifying event every day of the week and, therefore, have their signs on public display for substantially longer periods than § 4.405B(2) permits. Finally, Plaintiffs argue that they are prohibited from placing their signs in the public rights-of-way, yet § 4.405B(2) contains no similar prohibitions. What Plaintiffs neglect to mention, however, is that § 4.405B(2) only allows signs to be posted within a two mile radius of the subdivision perimeter. Section 4.402P allows signs to be placed without regard to the location of the event, giving Plaintiffs substantially greater flexibility in directing a larger segment of the public to their events. Accordingly, the Court finds that this provision, like the others, is more beneficial to noncommercial speech.

B[illegible]d those areas mentioned by Plaintiffs, § 4.40[illegible] contains other provisions that are comparatively less restrictive than those contained in § 4.405B(2). For example, §4.402P allows signs up to six feet in height and six square feet in size, while § 4.405B(2) restricts commercial users to four feet in height and three square feet in size. More important than the differences raised above, however, is a commercial/noncommercial distinction of paramount importance—the permit requirement. The Town's "Weekend Directional Signs" and "Homeowners Association Facilities Temporary Signs" are subject

to greater restrictions because they cannot be posted without a permit. Plaintiffs' directional signs, on the other hand, are exempted from the permitting process. *See G.K. Ltd.*, 436 F.3d at 1082 (reasoning that permits constitute "prior restraints [that] are constitutionally suspect"). The Court concludes that the Sign Code does not impermissibly favor commercial speech over noncommercial speech.

B. Equal Protection

In their Second Motion for Preliminary Injunction, Plaintiffs argue, in one brief page, that § 4.402P violates the Equal Protection Clause. According to Plaintiffs, § 4.402P places their religious speech in a disadvantageous position when compared to other speech regulated under the Sign Code.

"The Equal Protection Clause requires that statutes affecting First Amendment interests be narrowly tailored to their legitimate objectives." *Police Dept. of the City of Chicago v. Mosley*, 408 U.S. 92, 101 (1972); *accord ACLU of Nevada*, 466 F.3d at 799. However, "[t]he equal protection guarantee of the Fourteenth Amendment does not take from the States all power of classification." *Personnel Adm'r of Mass. v. Feeney*, 422 U.S. 256, 271 (1979). Indeed, "[w]hen the basic classification is rationally based, uneven effects upon particular groups within a class are ordinarily of no constitutional concern." *Id.* at 272. Here, any uneven effects on Plaintiffs are merely an unintended consequence of the contentneutral regulation that the Court has already determined to be narrowly tailored to the Town's

legitimate objectives. Unlike *Mosley*, where the Supreme Court found that "the discrimination [was] based on the content of [the plaintiff's] expression," the regulation here is based not on content, but instead on the legitimate concerns of aesthetics and traffic control. *Mosley*, 408 U.S. at 102. Plaintiffs have failed to demonstrate an Equal Protection violation.

III. CONCLUSION

Where possible, courts have the duty to "interpret a statute in a manner that renders it constitutionally valid." *Outdoor Sys., Inc. v. City of Mesa*, 997 F.2d 604, 611 (9th Cir. 1993). Mindful of this duty, and following a thorough review of the briefs and oral argument, the Court finds that Plaintiffs have failed to "demonstrate 'either: (1) a likelihood of success on the merits and the possibility of irreparable injury; or (2) that serious questions going to the merits were raised and the balance of hardships tips sharply in [their] favor.'" *Sw. Voter Registration Educ. Project v. Shelly*, 344 F.3d 914, 918 (9th Cir. 2003) (quoting *Clear Channel Outdoor Inc. v. City of L.A.*, 340 F.3d 810, 813 (9th Cir. 2003) (quoting *Walczak v. EPL Prolong, Inc.*, 198 F.3d 725, 731 (9th Cir. 1999))). Plaintiffs have also been unable to "'establish (1) a strong likelihood of success on the merits, (2) the possibility of irreparable injury if preliminary relief is not granted, (3) a balance of hardships [in their favor], and (4) advancement of the public interest.'" *Id.* (quoting *Johnson v. Cal. State Bd. of Accountancy*, 72 F.3d 1427, 1430 (9th Cir.1995) (internal quotation marks omitted)).

Accordingly, Plaintiffs' request for injunctive relief is denied.[5]

IT IS ORDERED denying Plaintiffs' Second Motion for Preliminary Injunction (Doc. 26).

DATED this 30th day of September, 2008.

s/ Susan R. Bolton
Susan R. Bolton
United States District Judge

[5] At the conclusion of oral argument on this Motion, the Court ordered supplemental briefing to address whether additional discovery would be required before this matter could move from a preliminary injunction to a permanent injunction. (Hr'g Tr. 30:24–31:19.) Since no injunctive relief is warranted, the question of discovery regarding a permanent injunction is moot.

Filed: July 24, 2013

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CLYDE REED, Pastor and GOOD NEWS COMMUNITY CHURCH, *Plaintiffs - Appellants,* v. TOWN OF GILBERT, ARIZONA and ADAM ADAMS, in his official capacity as Code Compliance Manager, *Defendants - Appellees.*	No. 11-15588 D.C. No. 2:07-cv-00522-SRB District of Arizona, Phoenix ORDER

Before: CALLAHAN and WATFORD, Circuit Judges, and SINGLETON, Senior District Judge.*

The full court has been advised of the petition for rehearing en banc. A judge of the court requested a vote on en banc rehearing. A majority of the non-recused active judges did not vote in favor of rehearing en banc. Fed. R. App. P 35(f).

The petition for rehearing en banc is DENIED.

---

* The Honorable James K. Singleton, Senior District Judge for the U.S. District Court for the District of Alaska, sitting by designation.

Article 4.4: Sign Regulations

Sections:

4.401 Purposes
4.402 General Sign Regulations
4.403 Sign Criteria
4.404 Real Estate Signs and Development Signs
4.405 Residential
4.406 Nonresidential Uses in Residential Zoning Districts
4.407 Commercial
4.408 Heritage Village Center
4.409 Office/Employment
4.4010 Public Facility/Institutional
4.4011 Notice of Violation
4.4012 Removal
4.4013 Violations, A-Frame Signs

4.401 Purposes

A. The purposes of the sign regulations are: to establish comprehensive provisions that will assure proper and efficient expression through visual communications involving signs compatible with the character and environment of the Town; to eliminate confusing, distracting, and unsafe signs; and to enhance the visual environment of the Town of Gilbert. The regulation of signs within the Town of Gilbert is necessary and in the public interest for the following reasons:

1. To promote and aid the public and private sectors in the identification, location, and advertisement of goods and services.

2. To preserve the beauty and the unique character of the Town of Gilbert and to protect the Town against visual blight.

3. To protect property values within the Town of Gilbert by assuring the compatibility of surrounding land uses.

4. To promote general safety and protect the general public from damage or injury caused by, or partially attributed to, the distractions, hazards, and obstructions which result from improperly designed or located signs.

5. To promote the general welfare and to provide a pleasing environmental setting and community appearance which are vital to the continued economic development of the Town.

6. To make signs compatible with overall Town design objectives which are important in attracting new residents and business to the community.

7. To make signs readable to the user in a clear, unambiguous, and concise manner.

8. To ensure signs are clear and compatible with the planned character of the adjacent

architecture and neighborhoods, and to provide the essential identity of, and direction to facilities in the community.

9. To emphasize small town historical character by promoting pedestrian oriented and appropriately scaled signage in the Heritage Village Center zoning district.

4.402 General Sign Regulations

A. ***Requirement of Permit.*** Except as provided in Section 4.402D: Signs Not Requiring a Sign Permit, it shall be unlawful for any person to construct, install, attach, place, paint, alter, relocate, or otherwise maintain any sign in the Town without first obtaining a sign permit in accordance with this article.

B. ***Requirement of Conformity.*** Signs shall not be installed, placed, or maintained in the Town except in conformance with this Article. If provisions of this Article are in conflict with any other Town code, the more restrictive requirement(s) shall apply. Signs maintained contrary to the provisions of this article are declared to be nuisances and may be abated as provided by law.

C. ***Sign Permit Application.*** Application for a sign permit shall be made on forms provided by the Development Services Manager.

D. ***Signs Not Requiring a Sign Permit.***

1. Signs installed by governmental jurisdictions when acting in their governmental capacity.

2. One Identification Sign per building entrance 6 square feet or less in area.

3. Permanent regulatory and parking signs 6 square feet or less in area and a maximum of 6 feet in height.

4. Permanent Wall Signs of an informational nature, not including business Identification Signs, such as signs identifying service or delivery entrances, 6 square feet or less in area.

5. Real Estate Signs 6 square feet or less in area and a maximum of 6 feet in height, in compliance with Section 4.404: Real Estate Signs.

6. Residential Open House Signs.

7. Political Signs, in compliance with Section 4.402I: Political Signs.

8. Ideological Signs, in compliance with Section 4.402J: Ideological Signs.

9. Garage Sale Signs, in compliance with Section 4.402K: Garage Sale Signs.

10. Business identification banners during street construction, in compliance with Section

4.402L: Business Identification Banners during Street Construction.

11. Interim business identification banners, in compliance with Section 4.402M: Interim Business Identification Banners.

12. Boutique Signs, in compliance with Section 4.402O: Boutique Signs.

13. Window Signs.

14. A-Frame Signs, in compliance with Section 4.402N: A-Frame Signs.

15. Temporary Directional Signs Relating to a Qualifying Event, in compliance with Section 4.402P: Temporary Directional Signs Relating to a Qualifying Event.

16. Construction Signs, in compliance with Section 4.404H: Construction Signs.

17. Suspended Signs 6 square feet or less in area in commercial projects and in the Heritage Village Center zoning district.

18. Umbrella Signs in the Heritage Village Center zoning district.

19. Historic Markers 6 square feet or less in area.

20. Restaurant Menu Signs 6 square feet or less in area, not including Drive-Through

Restaurant Menu Signs, displayed within 10 feet of the business entry.

21. Required street addresses.

22. Sign walkers, in compliance with section 4.402W.

23. Short-Term Display of Banners and Flags, provided that prior written notification of the sign type, size, placement and dates of proposed display is provided to the Code Compliance Administrator.

* * *

I. ***Political Signs***. Political Signs up to 16 square feet are permitted on property zoned for residential use. Political Signs up to 32 square feet are permitted on property zoned for nonresidential use, undeveloped Town property, and Town rights-of-way. Political Signs shall be removed no later than 10 days following the election, unless otherwise set forth in this article. Political Signs shall not exceed 6 feet in height. Political Signs may be placed in Town rights-of-way and on Town property used as a polling place, only in compliance with the following requirements:

1. Political Signs placed in the right-of-way shall not block visibility to any roadway or property. Political Signs located within 15 feet of back of curb, or edge of pavement if there is no curb, shall be presumed to block visibility.

2. Political Signs posted on property owned by the Town of Gilbert, which is used as a polling place, shall be:

   a. Limited to a' single sign not exceeding 4 square feet for each candidate or ballot question.

   b. Posted only during the early voting period or on the date of an election.

   c. Located outside the 75 foot limit.

   d. Removed from the property by 11:59 pm on the date of completion of the early voting period or the date of the election.

J. ***Ideological Signs.*** Ideological Signs are permitted in all zoning districts. Signs shall be no greater than 20 square feet in area and 6 feet in height.

* * *

P ***Temporary Directional Signs Relating to a Qualifying Event.*** Temporary Directional Signs Relating to a Qualifying Event shall be permitted subject to the following regulations:

1. *Size.* Signs shall be no greater than 6 feet in height and 6 square feet in area.

2. *Number.* No more than 4 signs shall be displayed on a single property at any time.

3. *Display.* Signs shall only be displayed up to 12 hours before, during, and 1 hour after the qualifying event ends. The person who installed the signs shall be responsible for removal. If the person installing the signs is unknown, the property owner shall be responsible.

4. *Location.* Temporary Directional Signs Relating to a Qualifying Event may be located off-site and shall be placed at grade level. Signs shall be placed only with the permission of the owner of the property on which they are placed.

5. *Prohibited Locations.* Temporary Directional Signs Relating to a Qualifying Event shall not be located:

   a. In the public right-of-way.

   b. On fences, boulders, planters, other signs, vehicles, utility facilities, or any structure.

6. *Construction.* Signs shall be:

   a. Constructed of durable and weather-resistant materials.

   b. Anchored or weighted down to avoid being displaced in windy conditions, or otherwise be a safety hazard to the public.

* * *

4.405 Residential

The following regulations shall apply to all single family and multi-family residential zoning districts.

* * *

B. ***Temporary Signs.***

* * *

2. *Weekend Directional Signs.* Weekend Directional Signs shall comply with the following regulations:

   a. Applicability. Weekend Directional Signs shall only be approved for new construction in a residential subdivision within the Town.

   b. Term. A sign permit for Weekend Directional Signs is valid for 1 year from the date of issuance or until the model home complex is permanently closed, whichever occurs first. The sign permit may be renewed annually.

   c. Quantity. A total of 15 Weekend Directional Signs may be permitted for each recorded subdivision plat.

   d. Size. Signs shall be no greater than 4 feet in height and 3 square feet in area.

e. Location. Weekend Directional Signs shall be located within a 2 mile radius of the subdivision perimeter.

f. Installation and Removal. Weekend Directional Signs shall be installed no earlier than 6:00 p.m. on Friday of each week and shall be removed no later than 8:00 a.m. on the following Monday. Signs shall be installed no earlier than 6:00 p.m. preceding any official U.S. holiday and shall be removed by 8:00 a.m. the day following the holiday, or Monday if the holiday occurs on Friday.

g. Spacing. Individual signs shall be located a minim um of 40 feet from any other Weekend Direction Sign, regardless of the builder. No more than 5 Weekend Directional Signs shall be located within any 500 foot length on the same side of a street, regardless of the builder.

h. Material. Signs shall be constructed of heavy duty, weather-resistant material, such as laminated paper, plastic foam core, or similar material. Placement stakes shall be wood or heavy gauge wire.

i. Label. The back of each individual sign shall contain in clear, legible form the current sign permit number, the builder's name, and the sign company's

name and phone number in letters at least 1 inch in height.

j. Prohibited Locations. Weekend Directional Signs shall not be placed:

(1) In the center median of any street; or

(2) Within 10 feet of the pavement edge of any street where no curb exists; or

(3) Within 2 feet of the face of curb where a curb exists; or

(4) On or closer than 3 feet from any vehicle, fire hydrant, light or traffic signal pole, traffic sign, bench, bus stop, tree, utility box, or any similar feature.

(5) On any property without written permission of the owner or person in control of the property.

4.406 Nonresidential Uses in Residential Zoning Districts

* * *

C. ***Temporary Signs.*** Temporary Signs shall comply with the following regulations:

* * *

4. *Homeowners Association Facilities Temporary Signs.* Temporary Signs for

Homeowners Association Facilities shall comply with the following regulations:

a. Applicability. Banners and Directional Signs for *Homeowners Association Facilities* are permitted that display information concerning seasonal or temporary events occurring in the development.

b. Sign Area and Location. A maximum of 80 square feet of sign area is permitted within the limits of the residential community.

c. Installation and Removal. Signs shall be installed no earlier than 30 days prior to the date of an event and shall be removed within 48 hours of completion of the event.

d. Materials. Signs shall be constructed of lightweight, weather-resistant material.

e. Placement. The regulations of Section 4.402: General Sign Regulations and Section 4.403.C: Placement of Signs shall apply.

* * *

Glossary of General Terms

* * *

Ideological Sign. Ideological Sign means a sign communicating a message or ideas for non-

commercial purposes that is not a *Construction Sign, Directional Sign, Temporary Directional Sign Relating to a Qualifying Event, Political Sign, Garage Sale Sign,* or a sign owned or required by a governmental agency.

* * *

Political Sign. A temporary sign which supports candidates for office or urges action on any other matter on the ballot of primary, general and special elections relating to any national, state or local election.

* * *

Real Estate Sign. A temporary sign advertising the sale, transfer, lease, or exchange of real property.

* * *

Temporary Directional Signs Relating to a Qualifying Event. Temporary Directional Signs Relating to a Qualifying Event means a *Temporary Sign* intended to direct pedestrians, motorists, and other passersby to a "qualifying event." A "qualifying event" is any assembly, gathering, activity, or meeting sponsored, arranged, or promoted by a religious, charitable, community service, educational, or other similar non-profit organization.

Temporary Sign. A sign not permanently attached to the ground, a wall or a building, and not designed or intended for permanent display.

* * *

2011 Sign Code
Zoning Code Text Amendments
October 6, 2011

The following Sections of the Town of Gilbert Land Development Code are amended to read as follows (additions in ALL CAPS; deletions in ~~strikeout~~):

* * *

4.402 General Sign Regulations

* * *

D. ***Signs Not Requiring a Sign Permit***

* * *

10. Business identification banners during street construction, in compliance with ~~Section~~ TABLE 4.402: ~~Business Identification Banners during Street Construction~~ TEMPORARY BANNER REGULATIONS.

11. Interim business identification banners, in compliance with Section TABLE 4.402: ~~Interim Business Identification Banners~~ TEMPORARY BANNER REGULATIONS.

12. ~~Boutique~~ BAZAAR Signs, in compliance with Section 4.4020: ~~Boutique~~ BAZAAR Signs.

* * *

16. TEMPORARY USES AND SPECIAL EVENTS SIGNS, IN COMPLIANCE WITH SECTION 4.402Y: TEMPORARY USES AND SPECIAL EVENTS SIGNS.

* * *

22. Required street addresses OR ADDRESS DIRECTORY SIGNS.

* * *

I. ***Political Signs***. Political Signs up to 16 square feet IN AREA are permitted on property zoned for residential use. Political Signs up to 32 square feet IN AREA are permitted on property zoned for nonresidential use, undeveloped Town property, and Town rights-of-way. POLITICAL SIGNS PLACED WITHIN THE RIGHT-OF-WAY SHALL CONTAIN THE NAME AND TELEPHONE NUMBER OF THE CANDIDATE OR CAMPAIGN COMMITTEE CONTACT PERSON. Political Signs MAY BE PLACED IN TOWN RIGHTS-OF-WAY AND ON TOWN PROPERTY NO MORE THAN 60 DAYS BEFORE A PRIMARY ELECTION AND shall be removed no later than ~~10~~ 15 days following the GENERAL election, EXCEPT THAT FOR A SIGN FOR A CANDIDATE IN A PRIMARY ELECTION WHO DOES NOT ADVANCE TO THE GENERAL ELECTION, THE PERIOD ENDS FIFTEEN DAYS AFTER THE PRIMARY ELECTION OR unless otherwise set forth in this article. Political Signs shall not exceed 6 feet in height. Political Signs may be placed in Town rights-of-way and on Town property used as a

polling place, only in compliance with the following requirements:

* * *

P. ***Temporary Directional Signs Relating to a Qualifying Event.*** Temporary Directional Signs Relating to a Qualifying Event shall be permitted subject to the following regulations:

* * *

4. *Location.* Temporary Directional Signs Relating to a Qualifying Event may be located off-site and shall be placed at grade level. Signs MAY BE PLACED IN THE RIGHT-OF-WAY OR, WITH PERMISSION OF THE PRIVATE PROPERTY OWNER, ON PRIVATE PROPERTY ~~shall be placed only with the permission of the owner of the property on which they are placed~~. SIGNS SHALL RELATE ONLY TO EVENTS OCCURRING WITHIN THE TOWN.

5. *Prohibited Locations.* Temporary Directional Signs Relating to a Qualifying Event shall not be located:

~~a. In the public right of way.~~

~~b.~~a. On fences, boulders, planters, other signs, vehicles, utility facilities, or any structure.

* * *

4.405 Residential

The following regulations shall apply to all single family and multi-family residential zoning districts.

* * *

B. ***Temporary Signs.***

* * *

2. *Weekend Directional Signs.* Weekend Directional Signs shall comply with the following regulations:

* * *

f. Installation and Removal. Weekend Directional Signs shall be installed no earlier than ~~6:00~~4:00 p.m. on Friday of each week and shall be removed no later than 8:00 a.m. on the following Monday. Signs shall be installed no earlier than ~~6:00~~4:00 p.m. preceding any official U.S. holiday and shall be removed by 8:00 a.m. the day following the holiday, or Monday if the holiday occurs on Friday.

* * *

U.S. CONST. AMEND I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST. AMEND XIV, § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

OPPOSITION BRIEF

Supreme Court, U.S.
FILED
FEB 19 2014
OFFICE OF THE CLERK

No. 13-502

In The
Supreme Court of the United States

PASTOR CLYDE REED; and
GOOD NEWS COMMUNITY CHURCH,

Petitioners,

v.

TOWN OF GILBERT, ARIZONA; and ADAM ADAMS,
in his Official Capacity as Code Compliance Manager,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF FOR RESPONDENTS TOWN OF GILBERT, ARIZONA, AND ADAM ADAMS IN OPPOSITION

ROBERT GRASSO, JR.
Counsel of Record
KIM S. ALVARADO
JENNY J. WINKLER
GRASSO LAW FIRM, P.C.
2430 West Ray Road, Suite 3
Chandler, Arizona 85224
Telephone (480) 730-5553
rgrasso@grassolawfirm.com
kalvarado@grassolawfirm.com
jwinkler@grassolawfirm.com
Attorneys for Respondents
Town of Gilbert, Arizona,
and Adam Adams

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

Library of Congress
Law Library

RESTATEMENT OF QUESTION PRESENTED

This case concerns a superseded regulation of temporary directional signs – which are non-permanent signs directing traffic to an activity or use. Petitioners Clyde Reed and Good News Community Church ("Petitioners") are seeking this Court's review of a 2008 version of section 4.402(P) of the Town of Gilbert's ("Gilbert") Land Development Code, which subsequently was amended in 2011. The challenged section of the 2008 Code, § 4.402(P), allows nonprofit organizations to place off-site, unattended, temporary signs providing directions to an event, without obtaining a permit and subject to reasonable time, place, and manner regulations. Petitioners' challenge to the temporary directional sign regulation was "as applied" to their activities, which now are different than when the Ninth Circuit decided the second appeal. Yet, as applied to Petitioners' activities in the neighboring city of Chandler during the second appeal, Petitioners wanted free, permanent, off-site billboards in Gilbert – and were trying to misuse Gilbert's temporary, directional sign regulation to fit that inapposite goal. Petitioners' claims were rejected twice by the district court and twice by two different panels of the Ninth Circuit (2009 and 2013). Contrary to Petitioners' arguments, the Ninth Circuit's 2013 decision did not create new circuit law or adopt any purported "subjective, motive-based" test, but rather applied well-established constitutional precedents from this Court

RESTATEMENT OF QUESTION PRESENTED – Continued

and within the Ninth Circuit to the record evidence. Moreover, a purported "circuit split" on a so-called "subjective, motive-based test" does not exist.

The restatement of the question presented is:

Did the Ninth Circuit properly apply the law of the case, circuit precedent, and United States Supreme Court precedent in concluding that Gilbert's 2008 version of a temporary directional sign ordinance for qualifying events sponsored by nonprofit organizations, § 4.402(P), was constitutional as applied to Petitioners' activities?

TABLE OF CONTENTS

	Page
Table of Authorities	iv
Introduction	1
Statement of the Case	2
A. Relevant Factual Background	2
B. Relevant Procedural Background	8
Reasons for Denying the Writ	14
I. The Issue Decided in *Reed II* Is Extremely Limited, and the Facts Have Changed Since *Reed II* Was Decided	15
II. Petitioners' Characterization of the Holding of *Reed II* is a Gross Distortion of the Ninth Circuit's Actual Holding	16
III. Petitioners' Characterization of Other Circuits' Purported Adoption of a "Subjective, Motive-Based Test" is a Gross Distortion of These Other Holdings	23
Conclusion	29

TABLE OF AUTHORITIES

Page

CASES

A.C.L.U. of Illinois v. Alvarez, 679 F.3d 583 (7th Cir. 2012), *cert. denied*, 133 S.Ct. 651, 184 L.Ed.2d 459 (2012) 26

Asgeirsson v. Abbott, 696 F.3d 454 (5th Cir. 2012), *cert. denied*, 133 S.Ct. 1634, 185 L.Ed.2d 616 (2013) 24, 26

Boos v. Barry, 485 U.S. 312, 108 S.Ct. 1157, 99 L.Ed.2d 333 (1988) 20

Brown v. Town of Cary, 706 F.3d 294 (4th Cir. 2013) 24, 25, 28

Carey v. Brown, 447 U.S. 455, 100 S.Ct. 2286, 65 L.Ed.2d 263 (1980) 21

Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984) 19

Frisby v. Schultz, 487 U.S. 474, 108 S.Ct. 2495, 101 L.Ed.2d 420 (1988) 20

G.K. Ltd. Travel v. City of Lake Oswego, 436 F.3d 1064 (9th Cir. 2006), *cert. denied*, 549 U.S. 822 (2006) 10

H.D.V.-Greektown, LLC v. City of Detroit, 568 F.3d 609 (6th Cir. 2009) 24, 25

Hill v. Colorado, 530 U.S. 703 (2000) ..... *passim*

Matthews v. Town of Needham, 764 F.2d 58 (1st Cir. 1985) 26, 27

TABLE OF AUTHORITIES – Continued

Page

Melrose, Inc. v. City of Pittsburgh, 613 F.3d 380 (3d Cir. 2010), *cert. denied*, 131 S.Ct. 1008, 178 L.Ed.2d 828 (2011) 25

Nat'l Adv. Co. v. Town of Babylon, 900 F.2d 551 (2d Cir. 1990) 27

Neighborhood Enters., Inc. v. City of St. Louis, 644 F.3d 728 (8th Cir. 2011) 23, 27

Rappa v. New Castle Cty., 18 F.3d 1043 (3d Cir. 1994) 25

Reed v. Town of Gilbert, 587 F.3d 966 (9th Cir. 2009) ..... *passim*

Reed v. Town of Gilbert, 707 F.3d 1057 (9th Cir. 2013) ..... *passim*

Renton v. Playtime Theatres, Inc., 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986) 19

Solantic, LLC v. City of Neptune Beach, 410 F.3d 1250 (11th Cir. 2005) 23, 28

Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994) 10, 19, 25

Wag More Dogs, LLC v. Cozart, 680 F.3d 359 (4th Cir. 2012) 25

Ward v. Rock Against Racism, 491 U.S. 781, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989) ..... *passim*

INTRODUCTION

The Court should deny certiorari review. Petitioners' numerous arguments on the merits have been rejected four times. Now, in an effort to attract this Court's attention, Petitioners have distorted beyond recognition the Ninth Circuit's holding in *Reed v. Town of Gilbert*, 707 F.3d 1057 (9th Cir. 2013), in a misplaced effort to manufacture a "circuit split" on a First Amendment issue. Contrary to the Petitioners' arguments, the Ninth Circuit has not and did not adopt a "subjective, motive-based" test to analyze the content neutrality of a sign ordinance. Nor has any other circuit, for that matter. Simply put, no so-called circuit split on the propriety of a "subjective, motive-based" test exists. Because this non-existent circuit split is the sole basis for Petitioners' request for the Court's review, the Petition should be denied.

Moreover, the circumstances of this case do not warrant this Court's review. The case below involved a narrow issue related to one section of the 2008 version of Gilbert's sign ordinance – a regulation of off-site, temporary directional signs – as applied to Petitioners' activities. Because both Gilbert's sign ordinance and Petitioners' activities have changed, this case does not represent a situation worthy of this Court's consideration.

STATEMENT OF THE CASE

A. Relevant Factual Background

In 2008, Gilbert adopted certain amendments to Chapter I of the Land Development Code ("Code"), including a provision on temporary directional signs to a qualifying event (§ 4.402(P)). Gilbert's 2008 amended ordinance did not ban protected speech based on content. Instead, the amended ordinance recognized that certain speech performed certain functions at certain times, places, and manners, and it regulated time, place, and manner accordingly. Off-site signs were more restricted than on-site signs. Numerous signs may be displayed without a permit, including the signs that Petitioners wanted to place – off-site, unattended, temporary directional signs to a qualifying event under § 4.402(P).

From the outset, Petitioners have argued that their off-site signs are "temporary directional signs" under § 4.402(P) (2008 version). A Temporary Sign is one "not permanently attached to the ground, a wall or a building, and not designed or intended for permanent display." (Glossary of General Terms, Appx. 154a.) A Directional Sign is one "directing traffic to an activity or use." (Glossary of General Terms.) Put together, the Code defines a temporary directional sign as a non-permanent sign directing traffic to an activity or use.

Section 4.402(P) defines "temporary directional signs relating to a qualifying event" as follows:

> [A] temporary sign intended to direct pedestrians, motorists, and other passersby to a "qualifying event." A "qualifying event" is any assembly, gathering, activity, or meeting sponsored, arranged, or promoted by a religious, charitable, community service, educational, or other similar non-profit organization.

(Glossary of General Terms, Appx. 154a.) The function of the provision is simple – it provides an opportunity for nonprofit organizations, like Petitioners' church, to place off-site, temporary signs directing traffic to an event without having to first obtain a permit. (§ 4.402(D)(15), (P).) By definition, these signs are *not* intended to be permanent, but are placed to direct passersby to "qualifying events" (such as Petitioners' religious gatherings, a YMCA soccer tournament, or a school's festival). Moreover, the regulation does not distinguish between a nonprofit organization's events involving commercial transactions (such as a car wash or book sale) and events with noncommercial conduct (such as a meditation session or book study).

Temporary directional signs relating to a qualifying event may be posted in any zoning district, and up to four (4) such signs may be displayed on any single property. (§ 4.402(P)(2), (4).) The total number of signs and properties displaying such signs is unlimited. (§ 4.402(P).) Such signs may be up to six (6)

square feet in area and up to six (6) feet in height. (§ 4.402(P)(1).) Finally, because the purpose of such signs is to direct passersby to an assembly, gathering, activity, or meeting, the signs may be posted and left unattended twelve (12) hours *before* the event (when passersby may be looking for the event), *during* the entire event, and one (1) hour *after* the event – thus, serving the very purpose for which such signs are temporarily posted. (§ 4.402(P)(3).)

At the time Petitioners originally filed their lawsuit, they held Sunday church services in a facility leased from an elementary school in Gilbert.[1] In February 2009, Petitioners moved their meeting place to a different school in the neighboring city of Chandler. Petitioners conducted a service for one hour on Sunday mornings. On weekdays, the premises were used by the public school for school activities unrelated to Petitioners. Petitioners also held events at the school site at different times on Sunday mornings and on Sunday afternoons. Further, Petitioners conducted a weekly meeting at a residential house in another neighboring municipality (Queen Creek) on Wednesday evenings, lasting one and one-half hours. Thus, for most of the time that this case was pending,

---

[1] Gilbert's Cross-Motion for Summary Judgment and supporting Statement of Facts with exhibits, filed August 27, 2010, provided the district court with the evidence in the record that supports the factual assertions set forth in the following paragraphs of this section. *See* United States District Court (Arizona), Case No. 2:07-cv-00522-SRB, ECF Dkt. Nos. 97-99.

Petitioners conducted no events within Gilbert. No one from Gilbert had any involvement in deciding the type, length, number, day of week, or starting time for any of Petitioners' events.

Petitioners engaged in numerous promotional activities designed to increase attendance at their church activities. These activities included maintaining a website, advertising in the local newspaper and telephone book, distributing pamphlets, making unsolicited telephone calls, and encouraging their congregants to extend personal invitations to others.

Petitioners also engaged in other promotional activities, which were tied to the close proximity of their meeting location in Chandler. Pastor Reed and other congregants handed out flyers in neighborhoods surrounding the leased school property so that people living nearby would know the church was meeting there. Petitioners also hired an advertising company to distribute flyers in neighborhoods surrounding the school.

Petitioners acknowledged that the purpose and function of off-site, temporary directional signs was to provide passersby with directions to an event. Petitioners also agreed that the close proximity of off-site directional signs to the event was important to the effectiveness of the signs. Pastor Reed agreed that off-site signs are impersonal. He did not believe a directional sign placed in certain, neighboring cities would be effective in causing a "casual, nonchurched" person to attend his services in Chandler.

During the district court proceedings, Petitioners were placing numerous off-site signs in Chandler, even though they acknowledged that these signs were prohibited under Chandler's ordinance. These signs consisted of six 2.5-foot x 3.5-foot A-frame (or sandwich-board) signs, and four 1.5-foot x 2-foot "real estate"-type signs (that stick into the ground). The signs displayed the name of the church, the website address, 9:00 a.m., Sunday, Ryan Elementary, and a directional arrow. After receiving the property owner's permission, Petitioners also hung a 4-foot x 10-foot purple banner on a chain-link fence, about three to four feet above ground, on private property near the corner of an intersection in Chandler. Petitioners had off-site signs stolen, vandalized, and damaged by weather or roadway conditions.

Petitioners believed it was "common sense" that a temporary directional sign to a Sunday service did not need to be posted on a weekday, and they did not ask their lessor (a local school district) for permission to post such signs on school property. Petitioners did not place any temporary directional signs related to their Wednesday evening meeting, because that meeting was meant for "insiders' participation."

Even after relocating to Chandler in February 2009, Petitioners continued, for a time, to place temporary directional signs at one location within Gilbert. Petitioners did not receive any communication from Gilbert relating to the placement of these signs. Contrary to Petitioners' misstatement (Pet., p. 13), Gilbert never enforced amended § 4.402(P)

against them. *See Reed v. Town of Gilbert*, 587 F.3d 966, 972, 973 (9th Cir. 2009).

During the litigation in the district court, Petitioners claimed they wished to place temporary directional signs near certain intersections within Gilbert, some three miles east of their meeting location, because it would be "possible" that some people would follow the directional signs for three miles to the school/church. Petitioners did not talk to any of the property owners at these locations to determine whether the owners would consent to the desired sign placement. In the past, Petitioners asked for and received permission from various property owners located within Gilbert to place their temporary directional signs on the owners' properties abutting roadways in Gilbert.

Petitioners acknowledged that other methods of advertising their services existed, but believed they were too inconvenient. For example, Petitioners could have congregants carry signs on sidewalks; however, they believed that leaving an unattended sign by the roadway was more convenient to their congregants. Petitioners also did not ask congregants to place signs on their own personal property, and Pastor Reed did not place any such signs on his own personal property. Pastor Reed's personal residence was a 30-minute drive from the church's Chandler meeting place, and he believed this distance was too far to make a directional sign effective.

Petitioners challenged § 4.402(P) (amended 2008) because they wanted to place their off-site, unattended, temporary directional signs concerning their Sunday morning services, which were taking place in Chandler, within Gilbert's public rights-of-way indefinitely. Petitioners also claimed that they wanted the "same treatment" as political signs, which could be displayed continuously, but only during an election season. Yet Petitioners acknowledged that a regulation that allowed them to post off-site, directional signs continuously, but only during a four-month period every two years, would not fit the purpose and function of directing passersby to Petitioners' services, which occur weekly for approximately one hour.

In their Petition, Petitioners disclosed for the first time that Petitioners moved their meeting location yet again, this time to a location back in Gilbert. (Pet., p. 16.) This fact was not before the district court or appellate court.

B. Relevant Procedural Background

In March 2007, Petitioners filed a Complaint against Gilbert, alleging that § 4.402(P) of the Code was unconstitutional on its face and as applied to Petitioners' activities. Petitioners asserted four claims based on speech, equal protection, and free exercise rights. Petitioners' Complaint asked for declaratory relief, a permanent injunction, and damages.

In February 2008, Petitioners filed a First Amended Complaint for Declaratory and Injunctive

Relief, alleging that § 4.402(P) (amended 2008) violated the First and Fourteenth Amendments and Arizona's Free Exercise of Religion Act (AzFERA), A.R.S. § 41-1493.01. (United States District Court (Arizona), Case No. 2:07-cv-00522-SRB, ECF Dkt. No. 32.) The First Amended Complaint sought a declaration that § 4.402(P), both in its original form and as amended in 2008, was unconstitutional on its face and as applied to Petitioners, and an injunction restraining enforcement of § 4.402(P) (amended 2008). Contrary to Petitioners' misstatements throughout their Petition, they did not seek any relief as to the entire Code. Petitioners also filed a Second Motion for Preliminary Injunction directed to amended § 4.402(P) but related only to the Free Speech and Equal Protection claims. (*Id.* at Dkt. No. 26.) The district court denied Petitioners' Second Motion for Preliminary Injunction, finding that Petitioners had failed to show a substantial likelihood of success on the merits of these claims. (*Id.* at Dkt. No. 43.) Petitioners appealed the district court's order. The Ninth Circuit unanimously affirmed in *Reed v. Town of Gilbert*, 587 F.3d 966 (9th Cir. 2009) (hereinafter, "*Reed I*"). As a threshold matter, *Reed I* expressly limited its analysis to an as-applied challenge. *Id.* at 974. The court found that Petitioners had not demonstrated that their facial challenge to § 4.402(P) warranted separate review. *Id.*

Concerning Petitioners' arguments, the court made several holdings. First, *Reed I* held that § 4.402(P) was not a content-based regulation. *Id.* at

979. The focus was "whether the ordinance targets certain content; whether the ordinance or exemption is based on identification of a speaker or event instead of on content; and whether an enforcement officer would need to distinguish content to determine applicability of the ordinance." *Id.* at 976. *Reed I* determined that § 4.402(P) satisfied this test. "A directional sign does not contain a message such that regulating directional signs would inherently 'distinguish favored speech from disfavored speech on the basis of the ideas or views expressed.'" *Id.* at 977 (citing and quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 643, 114 S.Ct. 2445, 2459, 129 L.Ed.2d 497 (1994)). The definition of a Qualifying Event sign "d[id] not mention any idea or viewpoint, let alone single one out for differential treatment," but "merely encompasse[d] the elements of 'who' is speaking and 'what event' is occurring." *Id.* at 977. These speaker-based and event-based characteristics previously were held constitutionally permissible under Ninth Circuit case law. *See id.* at 977-78 (citing and discussing *G.K. Ltd. Travel v. City of Lake Oswego*, 436 F.3d 1064 (9th Cir. 2006), *cert. denied*, 549 U.S. 822 (2006)). *Reed I* soundly rejected Petitioners' repeated argument that any organization of sign regulations by speaker and event somehow transformed the ordinance into an unconstitutional restriction of content:

> Surely, however, this regulation is a good example that the "officer must read it" test is not always determinative of whether a regulation is content based or content neutral.

> The district court indeed recognized that we have not applied the "officer must read it test" so strictly that a law must be invalidated any time it forces an officer's eyes to venture within the four corners of the sign. This case also highlights the absurdity of construing the "officer must read it" test as a bellwether of content. If applied without common sense, this principle would mean that every sign, except a blank sign, would be content based.

Reed I, 587 F.3d at 978 (internal citations and quotations omitted).

Second, *Reed I* concluded that the sign regulation was narrowly tailored to serve Gilbert's significant interests and left Petitioners with ample, alternative channels for communication. *Id.* at 979-81. Considering that a temporary directional sign to a qualifying event, by definition, is connected to a time, location, and event, § 4.402(P)'s regulation of time, place, and manner were reasonable.

Third, *Reed I* held that the Code did not impermissibly favor commercial speech over noncommercial speech. *Id.* at 981-82. The court considered and rejected Petitioners' inapposite comparisons to other parts of the Code.

Finally, *Reed I* concluded that the district court did not analyze Petitioners' argument that the Code impermissibly discriminated among certain forms of noncommercial speech, and remanded with instructions to consider this issue. *Id.* at 982-83.

Importantly, Petitioners did not seek this Court's review of *Reed I*.

In further district court proceedings after remand, the parties stipulated that Petitioners would not pursue any claims or relief related to Gilbert's original Code. (United States District Court (Arizona), Case No. 2:07-cv-00522-SRB, ECF Dkt. No. 91.) Petitioners also did not pursue any claim for actual damages. Thus, Petitioners' only remaining claims before the district court were for declaratory and injunctive relief related to Gilbert's amended § 4.402(P) (2008 version) as applied to Petitioners' directional signs concerning Sunday morning services. As to these remaining claims, the parties filed cross-motions for summary judgment. (*Id.* at Dkt. Nos. 97, 100.) The district court issued an order denying Petitioners' motion for summary judgment and granting Gilbert's cross-motion for summary judgment. (*Id.* at Dkt. No. 117.)

Petitioners appealed again. The briefing on appeal was completed by October 6, 2011. On November 21, 2011, Gilbert filed a Motion to Dismiss Appeal, arguing that amendments to § 4.402(P), effective November 6, 2011, mooted the appeal. (United States Court of Appeals for the Ninth Circuit, Case No. 11-15588, ECF Dkt. No. 22.) The 2011 amendments allowed temporary directional signs to qualifying events held within Gilbert to be placed within public

rights-of-way without a permit.[2] (Appx. 157a.) In a response and reply, the parties briefed only the legal question of whether the 2011 amendments mooted the pending appeal. (*Id.* at Dkt. Nos. 23, 24.) Thus, contrary to Petitioners' misstatement (Pet., p. 16), the constitutionality of the 2011 amendments to § 4.402(P) was not briefed for the Ninth Circuit's consideration.

A different panel of the Ninth Circuit affirmed the district court's order in *Reed v. Town of Gilbert*, 707 F.3d 1057 (9th Cir. 2013) (hereinafter, "*Reed II*"). The appellate court properly refused to revisit *Reed I* and took the time to carefully analyze and describe the ground that it was not going to cover again. *See Reed II*, 707 F.3d at 1062-64. The two issues decided in *Reed I*, which the *Reed II* court expressly found had been "establishe[d]" for the court's remaining analysis, were (1) "§ 4.402(P) is not a content-based regulation," and (2) "the Sign Code generally is a reasonable (i.e., not unconstitutional) time, place and manner restriction." *See Reed II*, 707 F.3d at 1067 (quoting and citing *Reed I*, 587 F.3d at 979, 980). The court stated that the "primary substantive issue now on appeal" was "whether the Sign Code improperly discriminates between different forms of non-commercial speech." *Id.* Resolving this limited issue

---

[2] In the 2008 version of § 4.402(P), there was no limitation that temporary directional signs to a qualifying event relate to events held in Gilbert, and such signs could not be placed in the public right-of-way.

in favor of Gilbert, the *Reed II* court affirmed the district court's order dismissing all four of Petitioners' causes of action.[3]

REASONS FOR DENYING THE WRIT

The issue presented to and decided by the Ninth Circuit in *Reed II* is extremely limited, does not have nationwide application, and thus does not warrant this Court's consideration. Moreover, the only bases for review presented in the Petition are Petitioners' arguments that (1) *Reed II* purportedly adopts a subjective, motive-based test to determine the content neutrality of a sign ordinance, and (2) such a test purportedly "magnifies" a three-way split among the circuit courts. Both arguments are incorrect and represent a gross distortion of the holdings of the cited circuit cases.

[3] The court in *Reed II* also concluded that the 2011 amendments did not moot Petitioners' challenge to the 2008 version of § 4.402(P). *Id.* at 1065-67. The court did not consider any substantive arguments concerning the 2011 amendments, expressly holding that any challenge to the 2011 version of § 4.402(P) should be initially litigated in the district court. *Id.* at 1077.

I. The Issue Decided in *Reed II* Is Extremely Limited, and the Facts Have Changed Since *Reed II* Was Decided

Petitioners' current as-applied challenge is extremely limited. They are not seeking review of the dismissal of their Equal Protection, Free Exercise, or AzFERA claims. They are not challenging *Reed II*'s determination that § 4.402(P) is narrowly tailored to serve significant governmental interests and leaves open ample, alternative means of communication. They have not advanced a facial challenge to the entire Code.

Instead, they have asked this Court to review *Reed II*'s limited holding, which affirmed dismissal of Petitioners' requested remedies of declaratory and injunctive relief concerning the 2008 version of § 4.402(P)'s regulation of noncommercial speech as-applied to their activities. First, this regulation subsequently was amended in 2011. Second, Petitioners revealed in their Petition that their activities have changed since *Reed II* was decided, which significantly affects an as-applied challenge. The narrow, fact-specific issue presented in *Reed II* – especially in light of the changed factual circumstances – does not warrant this Court's consideration.

II. Petitioners' Characterization of the Holding of *Reed II* is a Gross Distortion of the Ninth Circuit's Actual Holding

The Court should deny the Petition for the simple reason that *Reed II* did not adopt a "subjective, motive-based test," which the Petition describes as the question for this Court's review. In fact, the Petition's mischaracterization of the issue for certiorari review distorts beyond recognition the actual holding of *Reed II*.

To start with, *Reed II* did not formulate any "new test" of content neutrality. Rather, *Reed II* accepted *Reed I*'s holding that § 4.402(P) was a content-neutral regulation as the "law of the case," thoughtfully analyzed that holding, and then applied that precedent (along with other Supreme Court and Ninth Circuit precedents) to the single legal issue on appeal related to the Free Speech claim. *See Reed II*, 707 F.3d at 1062-64, 1067 ("*Reed [I]* limits our consideration of Good News' challenges to the Sign Code. Thus, our opinion in *Reed [I]* constitutes law of the case and is binding on us.") (internal citations omitted). Simply put, *Reed II* did not create a new test concerning content neutrality.

Nor did *Reed I* adopt any "subjective, motive-based" test to determine the content neutrality of a sign ordinance. Indeed, the exact opposite is true. *Reed I* specifically noted that Gilbert's content-neutral motive to promote speech interests, such as Petitioners' advertisement of the time and location of

their church services, was not the sole, determinative factor in analyzing the content neutrality of the ordinance:

> Nothing in the regulation suggests any intention by Gilbert to suppress certain ideas through the Sign Code, nor does Good News claim that Gilbert had any illicit motive in adopting the ordinance. Gilbert asserts that the exemptions to the Sign Code were included to accommodate the speech interests of various members of the Gilbert community, and that, in particular, § 4.402(P) is intended to provide groups such as Good News the opportunity to spread the word about their events without the restriction of a permitting process. *Gilbert's unimpeached intentions, however, do not satisfy our inquiry.*

Reed I, 587 F.3d at 975 (citation omitted) (emphasis added). After analyzing other Ninth Circuit precedents, *Reed I* held that the determination of content-neutrality focused on "whether the ordinance targets certain content; whether the ordinance or exemption is based on identification of a speaker or event instead of on content; and whether an enforcement officer would need to distinguish content to determine applicability of the ordinance." *Id.* at 976. Applying this analysis, *Reed I* "conclude[d] that § 4.402(P) is not a content-based regulation: It does not single out certain content for differential treatment, and in enforcing the provision an officer must merely note the content-neutral elements of who is speaking through

the sign and whether and when an event is occurring." *Id.* at 979.

Reed II applied this analysis to the limited, Free Speech issue remaining on appeal. *See Reed II*, 707 F.3d at 1068. As to the regulation of noncommercial speech through stationary, unattended, off-site signs, *Reed II* concluded that speaker-based or event-based distinctions are "permissible where there is no discrimination among similar events or speakers." *Id.* at 1069 (citing and quoting *Reed I*, 587 F.3d at 979). Each exemption from the permitting process for Temporary Directional Signs relating to a Qualifying Event (§ 4.402(P)), Political Signs (§ 4.402(I)), and Ideological Signs (§ 4.402(J)) was "based on objective criteria and none draws distinctions based on the particular content of the sign." *Reed II*, 707 F.3d at 1069. Those objective criteria relate to the *function*, not message, of the sign. *See id.* Nothing about *Reed II*'s holding, applying the precedent of *Reed I* to the single issue on appeal, depended upon Gilbert's subjective motives. *See id.* at 1067-70.

After reaching its holding that Gilbert's sign ordinance did not impose an impermissible, content-based restriction on forms of noncommercial speech, the *Reed II* court included a lengthy discussion of this Court's precedent in *Hill v. Colorado*, 530 U.S. 703 (2000). *See id.* at 1070-72 ("[O]ur approach is in accord with the Supreme Court's opinion in *Hill v. Colorado*[ ].") *Hill* quoted from and relied upon *Ward v. Rock Against Racism*, 491 U.S. 781, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989), to begin its

content-neutrality analysis: "The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of *disagreement* with the message it conveys." *Hill*, 530 U.S. at 719 (quoting *Ward*, 491 U.S. at 791) (emphasis added). In other words, although evidence of government animus toward an idea and an intent to disparage or suppress that message may prove that a regulation is content-based, *see Hill*, 530 U.S. at 719, the opposite is not true. Evidence that the government had a content-neutral or innocuous motive does not prove that a regulation is content-neutral. *See Turner Broad. Sys.*, 512 U.S. at 642-43, 114 S.Ct. at 2459. In the former situation (evidence of government animus toward a specific viewpoint), strict scrutiny will apply; in the latter situation (evidence of a content-neutral motive), further analysis is required.

Ward explained further that "[a] regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Ward*, 491 U.S. at 791 (citing *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47-48, 106 S.Ct. 925, 929-30, 89 L.Ed.2d 29 (1986)). "Government regulation of expressive activity is content neutral so long as it is '*justified* without reference to the content of the regulated speech.'" *Id.* at 791-92 (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293, 104 S.Ct. 3065, 3069, 82 L.Ed.2d 221 (1984)) (emphasis

added in *Ward*). *Ward* determined that the city's principal justification for the challenged ordinance was its desire to control noise levels at certain events and to limit noise in residential areas, which had nothing to do with content. *See id.* at 792 (citing and quoting *Boos v. Barry*, 485 U.S. 312, 320, 108 S.Ct. 1157, 1163, 99 L.Ed.2d 333 (1988)).

Hill distilled *Ward*'s "principal inquiry" into three independent reasons for determining that a regulation is content-neutral. *See Hill*, 530 U.S. at 719, 120 S.Ct. at 2491. First, a regulation of the places where some speech may occur is not a regulation of speech. *See id.* Second, after considering the ordinance's legislative history, the regulation was not adopted because of disagreement with the message being conveyed. Rather, the restrictions were viewpoint-neutral. *See id.* In *Hill*, this consideration was met even though the legislative history clearly showed that the primary motivation for the ordinance's enactment were activities in the vicinity of abortion clinics. *See id.* at 715, 725, 120 S.Ct. at 2489, 2494 at 725 (citing *Frisby v. Schultz*, 487 U.S. 474, 108 S.Ct. 2495, 101 L.Ed.2d 420 (1988)). Third, the State's justifications are unrelated to the content of speech. *See id.* at 719-20, 120 S.Ct. at 2491.

Hill squarely addressed and rejected the petitioners' argument – nearly identical to the argument repeatedly advanced by Petitioners from the outset of this case – that merely examining the content of speech to determine whether the conduct was covered by the statute automatically made the law

content-based. *See id.* at 720, 120 S.Ct. at 2491 (construing *Carey v. Brown*, 447 U.S. 455, 462, 100 S.Ct. 2286, 65 L.Ed.2d 263 (1980)). The *Hill* Court stated:

> It is common in the law to examine the content of a communication to determine the speaker's purpose. We have never held, or suggested, that it is improper to look at the content of an oral or written statement in order to determine whether a rule of law applies to a course of conduct.

Id. at 721, 120 S.Ct. at 2492.[4] *Hill* further concluded that a "cursory examination" of the particular speech to determine if it was covered or excluded from the regulation was not "problematic." *Id.* at 722, 120 S.Ct. at 2492.[5] After considering the "principal inquiry" described in *Ward* and applying the three reasons discussed above, the *Hill* Court affirmed the state court's conclusion that the challenged ordinance was content-neutral. *See id.* at 725, 120 S.Ct. at 2494.

---

[4] *Reed I* cited this portion of *Hill* to support its conclusion that "[i]dentifying a triggering event under § 4.402(P) does not entail making a content-based determination." *Reed I*, 587 F.3d at 978.

[5] A four-Justice concurrence emphasized that the validity of a speech regulation does not depend on showing that the particular mode of delivery has no association with a particular subject or opinion. *See Hill*, 530 U.S. at 735, 120 S.Ct. at 2500 (Souter, J., concurring). Simply put, concern that the government will suppress discussion of a subject or viewpoint is not raised when the law addresses the circumstances of the delivery of speech. *Id.* (Souter, J., concurring).

Reed II simply applied the *Hill* analysis to further support its holding. *Reed II* cited *Hill* and *Ward* for the "principal inquiry in determining content neutrality" and also cited the three independent, content-neutral reasons specified by *Hill*. *See Reed II*, 707 F.3d at 1071. *Reed II* then examined the evidence in the record and determined that § 4.402(P) (2008 version) satisfied the *Ward/Hill* "principal inquiry" and met each of the *Hill* factors: Gilbert did not adopt the regulation because it disagreed with Petitioners' message;[6] the ordinance regulates the places where some speech may occur; the justifications for the regulation are unrelated to a sign's content; and the ordinance places no restriction on particular viewpoints and had uniform application. *See id.* at 1071-72. In short, § 4.402(P) (2008 version) was "reasonable in relationship to its purpose – providing direction to temporary events." *Id.* at 1072. Therefore, applying the Supreme Court's analysis from *Hill*, the Ninth Circuit determined that § 4.402(P) (2008 version) "is content-neutral as that term has been defined by the Supreme Court." *Id.*

Reed II did not create or adopt a "subjective, motive-based" test, as argued by Petitioners. Therefore, even if this Court wishes to review the propriety of a so-called "subjective, motive-based" test of a sign ordinance, review of *Reed II* is not the appropriate

---

[6] On the other hand, as noted in *Reed I*, the record evidence that Gilbert adopted § 4.402(P) for content-neutral reasons was not case-dispositive. *See* 587 F.3d at 975.

vehicle for doing so. That purported test simply did not form *Reed II*'s limited holding on Petitioners' Free Speech claim.

III. Petitioners' Characterization of Other Circuits' Purported Adoption of a "Subjective, Motive-Based Test" is a Gross Distortion of These Other Holdings

In an obvious effort to attract this Court's attention, Petitioners argue that *Reed II* "magnifies" a purported circuit split on the propriety of a so-called "subjective, motive-based" test. Petitioners dramatically changed the substance of this argument from when they first attempted to attract rehearing en banc in the Ninth Circuit in February 2013. (United States Court of Appeals for the Ninth Circuit, Case No. 11-15588, ECF Dkt. No. 34.) The argument lacked merit then, and it continues to lack any merit now.

When Petitioners filed their Petition for Rehearing En Banc with the Ninth Circuit in February 2013, they advanced six (6) substantive arguments related to the Free Speech claim. As one part of their sixth and last-ditch argument, Petitioners argued, in one paragraph, that *Reed II* "implicates" a circuit split on whether a plaintiff "must establish" an improper, suppressive government motivation when challenging a speech regulation. (*Id.* at p. 15.) Petitioners argued that the Eighth and Eleventh Circuits properly analyzed the issue, citing *Neighborhood Enters., Inc. v. City of St. Louis*, 644 F.3d 728 (8th Cir. 2011) and *Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250

(11th Cir. 2005), while the Fourth, Fifth, Sixth, and Ninth Circuits did not, citing *Brown v. Town of Cary*, 706 F.3d 294 (4th Cir. 2013), *Asgeirsson v. Abbott*, 696 F.3d 454 (5th Cir. 2012), *cert. denied*, 133 S.Ct. 1634, 185 L.Ed.2d 616 (2013), *H.D.V.-Greektown, LLC v. City of Detroit*, 568 F.3d 609, 622 (6th Cir. 2009), and *Reed II*. (United States Court of Appeals for the Ninth Circuit, Case No. 11-15588, ECF Dkt. No. 34, pp. 15-16.)

In Response, Gilbert noted that Petitioners had failed to argue that any circuit split actually existed that could be resolved by the Ninth Circuit en banc. (*Id.* at Dkt. No. 36, p. 9.) Gilbert noted that two circuits (Eighth and Eleventh) seemed to strictly apply the "officer must read it" test, while the majority of circuits (Third, Fourth, Fifth, Sixth, Seventh, and Ninth) employed a more practical test of examining elements of the speech as described by the Supreme Court in *Hill*. The government's content-neutral motives as the sole, determining factor, with no further analysis required, was *not* the holding in any of these cases. Thus, contrary to Petitioners' misstatement (Pet., pp. 20, 26), Gilbert never "conceded" or even addressed the issue of a so-called circuit split on a "subjective, motive-based" test – because such a test was not at issue in the cases cited by Petitioners.

Now, in their Petition to this Court (filed in October 2013), Petitioners have dramatically changed what they contend to be the parameters of a so-called circuit split, while intentionally but erroneously

placing the Ninth Circuit in the minority of that purported split. First, the Fourth and Sixth Circuits have not adopted a subjective, motive-based test, as argued by Petitioners. In the case cited by Petitioners, the Fourth Circuit relied upon *Hill* and Fourth Circuit precedent to reiterate its three-part operative test for content neutrality. *See Brown*, 706 F.3d at 302-03.[7] The Fourth Circuit expressly rejected any argument that a government's content-neutral motives, standing alone, would save a content-based restriction. *See id.* at 303-04 (citing and quoting *Turner Broad. Sys.*, 512 U.S. at 642-43, 114 S.Ct. at 2459). The Sixth Circuit cited *Ward* and *Hill* for the same three-part analysis. *See H.D.V.-Greektown*, 568 F.3d at 621-24. Second, the Third Circuit has long followed the same rationale. *See Rappa v. New Castle Cty.*, 18 F.3d 1043, 1065 (3d Cir. 1994) (concluding that state may exempt from a general ban such speech having content with a significant relationship to a specific location or its use, so long as the state did not make the distinction in an attempt to censor certain viewpoints); *see also Melrose, Inc. v. City of Pittsburgh*, 613 F.3d 380, 390-92 (3d Cir. 2010)

---

[7] The independent factors are: whether "(1) the regulation is not a regulation of speech, but rather a regulation of the places where some speech may occur; (2) the regulation was not adopted because of disagreement with the message the speech conveys; or (3) the government's interests in the regulation are unrelated to the content of the affected speech." *Id.* (quoting *Wag More Dogs, LLC v. Cozart*, 680 F.3d 359, 366 (4th Cir. 2012) (internal citation omitted)). These are the same, independent factors discussed in *Hill*.

(considering lack of evidence that zoning board sought to censor certain viewpoints in denying sign applications as one part of analysis, and then considering other factors), *cert. denied*, 131 S.Ct. 1008, 178 L.Ed.2d 828 (2011). Moreover, although Petitioners ignored the Fifth and Seventh Circuits, published decisions from these circuits likewise are in accord. *See Asgeirsson*, 696 F.3d at 460 ("A regulation is not content-based, however, merely because the applicability of the regulation depends on the content of the speech."), at n. 6 (citing *Ward*, 491 U.S. at 791), and at n. 7 (collecting Fifth Circuit cases dating back to 1999); *A.C.L.U. of Illinois v. Alvarez*, 679 F.3d 583, 603 (7th Cir. 2012) (citing *Ward*, 491 U.S. at 791, and *Hill*, 530 U.S. at 721, for support that a law is not content-based simply because a court must look at the content of a statement to determine whether a rule of law applies), *cert. denied*, 133 S.Ct. 651, 184 L.Ed.2d 459 (2012).

Petitioners now argue that the First and Second Circuits are on the other side of a purported split on a subjective, motive-based test, but the cited cases do not support their argument. In the 1985 case from the First Circuit, the court invalidated a town bylaw that banned all outdoor signs on private property, including political signs – "a form of speech generally accorded great protection" – but excepted commercial signs related to the premises. *See Matthews v. Town of Needham*, 764 F.2d 58, 60-61 (1st Cir. 1985). The court did not base its holding on the government's content-neutral motives, but rather found the bylaw

unconstitutional because it prohibited almost all forms of noncommercial speech on private property. *See id.* at 61. Similarly, the 1990 case from the Second Circuit cited by Petitioners concerned the differences between commercial and noncommercial speech. *See Nat'l Adv. Co. v. Town of Babylon*, 900 F.2d 551 (2d Cir. 1990). In that case, the court invalidated one portion of a sign code for the reason that the record contained no evidence of the particular governmental interests sought to be advanced by a wholesale ban on all commercial speech. *See id.* at 556.

Even the Eighth Circuit case cited by Petitioners does not support their argument that the Eighth Circuit falls on what Petitioners describe as the "correct" side of a so-called "subjective, motive-based" test. In *Neighborhood Enterprises*, the Eighth Circuit noted that "a content-neutral justification for the regulation is not given controlling weight without further inquiry." *See* 644 F.3d at 737 (internal quotations and citations omitted). This analysis is consistent with *Ward* and *Hill*. The Eighth Circuit further stated that a city's content-neutral justification for a speech regulation must accomplish that purpose in a content-neutral manner, and a city cannot differentiate between speakers for reasons unrelated to the legitimate interests that prompted the regulation. *Id.* Therefore, contrary to Petitioners' argument, the Eighth Circuit examines the government's motivation for the speech regulation as one part of the entire analysis.

This leaves Petitioners with just the Eleventh Circuit's decision in *Solantic*, decided in 2005. In that case, the Eleventh Circuit noted there was no evidence in the record that the city had acted with animus toward the ideas contained in the plaintiffs' publications. *See* 410 F.3d at 1259, n. 8. However, the *lack* of such evidence was not case-dispositive – *i.e.*, the lack of discriminatory animus did not render a law content-neutral. Therefore, even the Eleventh Circuit does not fall on what Petitioners describe as the "correct" side of a so-called "subjective, motive-based" test.

Instead, as discussed above, the Eighth and Eleventh Circuits have applied absolute interpretations of an "officer must read it" test. Such an interpretation has been rejected by the majority of courts, *see Brown*, 706 F.3d at 302 (collecting numerous cases), and is inconsistent with *Hill*. However, that issue is *not* the question presented in the Petition. None of the circuit cases cited in the Petition hold that a city's "mere assertion" of a lack of discriminatory motive renders a law content-neutral, with no further analysis required. (Petition's "question presented," p. i.) Simply put, a review of the cases cited by Petitioners as representing either side of a so-called circuit split on a "subjective, motive-based" test reveals that no such split exists.

Because the Ninth Circuit in *Reed II* did *not* create or adopt a "subjective, motive-based" test and

because a circuit split over such a test does *not* exist, the Petition should be denied.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that this Court deny review.

Respectfully submitted,

ROBERT GRASSO, JR.
Counsel of Record
KIM S. ALVARADO
JENNY J. WINKLER
GRASSO LAW FIRM, P.C.
2430 West Ray Road, Suite 3
Chandler, Arizona 85224
Telephone (480) 730-5553
rgrasso@grassolawfirm.com
kalvarado@grassolawfirm.com
jwinkler@grassolawfirm.com
Attorneys for Respondents Town of Gilbert, Arizona, and Adam Adams

February 19, 2014

REPLY BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
MAR - 5 2014
OFFICE OF THE CLERK

No. 13-502

IN THE

Supreme Court of the United States

PASTOR CLYDE REED AND GOOD NEWS COMMUNITY CHURCH,

Petitioners,

v.

TOWN OF GILBERT, ARIZONA; AND ADAM ADAMS, IN HIS OFFICIAL CAPACITY AS CODE COMPLIANCE MANAGER,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Kevin H. Theriot
Jeremy D. Tedesco
Alliance Defending Freedom
15100 N. 90th Street
Scottsdale, AZ 85260
(480) 444-0020

David A. Cortman
Counsel of Record
Rory T. Gray
Alliance Defending Freedom
1000 Hurricane Shoals Rd.
N.E., Ste. D-1100
Lawrenceville, GA 30043
dcortman@alliance
defendingfreedom.org
(770) 339-0774

Counsel for Petitioners

Library of Congress
Law Library

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 1

ARGUMENT 2

I. The Content-Based Regulation of Temporary Signs Remains Intact. 2

II. Respondents Inaccurately Describe the Church's Claims, the Issue Raised in the Petition, and Many Other Aspects of this Case. 3

III. The Decision Below Exacerbates a Longstanding, Entrenched, and Well-Acknowledged Circuit Conflict. 7

IV. The Ninth Circuit's Decision Conflicts With This Court's Precedent. 12

CONCLUSION 13

TABLE OF AUTHORITIES

***Cases*:**

ACLU v. Alvarez,
679 F.3d 583 (7th Cir. 2012) 7

Asgeirsson v. Abbott,
96 F.3d 454 (5th Cir. 2012) 7

Brown v. Town of Cary,
706 F.3d 294 (4th Cir. 2013) 7-8

Clatterbuck v. City of Charlottesville,
708 F.3d 549 (4th Cir. 2013) 7

H.D.V.-Greektown, LLC v. City of Detroit,
568 F.3d 609 (6th Cir. 2009) 8-9

Hill v. Colorado,
530 U.S. 703 (2000).....12-13

Melrose, Inc. v. City of Pittsburgh,
613 F.3d 380 (3d Cir. 2010).....7

National Advertising Company v. Town of Babylon,
900 F.2d 551 (2d Cir. 1990).....11

Neighborhood Enterprises, Inc. v. City of St. Louis,
644 F.3d 728 (8th Cir. 2011) 7

Solantic, LLC v. City of Neptune Beach,
410 F.3d 1250 (11th Cir. 2005).....7

***Other Authorities*:**

Environmental Aesthetics and Free Speech: Toward a Consistent Content Neutrality Standard for Outdoor Sign Regulation, 2 Mich. J. Envtl. & Admin. L. 185 (2012).....9

INTRODUCTION

This case presents the ideal opportunity for the Court to address a longstanding, entrenched, and well-acknowledged circuit conflict regarding the proper test for determining whether a sign code is content-neutral. The Ninth Circuit's decision below joins those of several other circuits that permit content-neutral motives to excuse content-based distinctions on the face of a sign code. This mode of analysis conflicts with that employed by the First, Second, Eighth, and Eleventh Circuits (and this Court), which categorize a sign code as content-based if it facially distinguishes based on content, regardless of governmental motive or purpose. Respondents conceded this conflict existed in their response to the petition for rehearing en banc in the court below.

Respondents charge Petitioners Good News Community Church and Pastor Reed (hereinafter the "Church") with distorting the decision below and the circuit conflict in an attempt to distract the Court from the clean vehicle the petition provides to resolve a critical question of First Amendment law. That effort is unfounded.

Respondents also claim that a minor 2011 amendment to their Sign Code somehow makes this case unworthy of review. But the 2011 amendment left all but one of the content-based limitations the Church initially challenged intact, and imposes yet another content-based limitation on its signs that is not applied to political, ideological, or other similar temporary signs. The slight modification made to

the Code in 2011 changes nothing. It continues to facially regulate signs based on their content and to treat political, ideological, and other temporary signs far better than the Church's temporary church-invitation signs.

ARGUMENT

I. The Content-Based Regulation of Temporary Signs Remains Intact.

Contrary to Respondents' assertions in their Opposition, Opp. 1, 15, neither the slight 2011 modification, nor an earlier amendment to their Sign Code, has resolved the content-based discrimination the Church complained of initially. Indeed, it persists to this day.

The Church's original complaint challenged Respondents' Code because it "discriminate[d] against religious assembly signs by requiring them to be smaller in size, less in number, placed in less favorable locations, and displayed for much less time than political signs, ideological signs, and many other comparable signs." ER 765, ¶ 1. A minor 2008 change to the Code left all of the content-based restrictions the Church initially challenged intact. It simply increased those subject to the restrictions by expanding § 4.402P so that it applied to signs advertising the assemblies, gatherings, activities, or meetings of some (but not all) nonprofit organizations, rather than just religious assemblies. This is now called the Qualifying Event Sign provision.

The minor 2011 amendment maintains all of the content-based restrictions the Church initially challenged except for one. And ironically, when it removed the restriction on placing Qualifying Event Signs in rights-of-way, it added yet another content-based limitation on the Church's signs: that they must relate to events in Gilbert. App. 17a. This new limitation was targeted at the Church, Pet. 15-16, and was not imposed on political, ideological, or other temporary signs. *See* Defs.' Ans. Br. 31, 9th Cir. Case No. 11-15588, ECF No. 13 (acknowledging that under the Code political signs have no in-town "situs" requirement).

The Church's November 2013 relocation of its church services back into Gilbert only strengthens its case. The Church has a continuing desire to place signs advertising its services. And Respondents' Code, both on its face and as-applied, continues to limit the size, duration, number, and other characteristics of the Church's religious signs far more severely than similar temporary signs that Respondents permit.

II. Respondents Inaccurately Describe the Church's Claims, the Issue Raised in the Petition, and Many Other Aspects of this Case.

Respondents assert that the Church has not pursued a facial challenge to the Code. Opp. 15. On the contrary, the record shows that the Church has consistently pursued facial and as-applied challenges throughout this litigation.

In its Amended Complaint, the Church repeatedly alleged that the Code is invalid on its face and as applied, ER 776 ¶ 97, 777 ¶ 105, 779 ¶ 121, 780 ¶ 138, and its Prayer for Relief sought an order striking down the Code "facially and as applied." ER 781. The first question presented in the Church's opening brief below also sought review of its facial claim. Appellants' Opening Br. 4, 9th Cir. Case No. 11-15588, ECF No. 6 (noting the many content-based problems with the code and asking *"[i]s the Code content-based on its face* and as applied to the Plaintiffs' religious signs in violation of the Free Speech Clause?") (emphasis added). It is plain that the Church's facial claim against Respondents' Code was pressed below and is squarely before the Court.

Respondents also inaccurately frame the issue raised in the petition. They claim that *Reed II* involved a "narrow issue related to one section of the 2008 version of Gilbert's sign ordinance – [§ 4.402P] – as applied to Petitioners' activities." Opp. 1; *see also* Opp. 15. But *Reed I* decided the narrow issue of the constitutionality of § 4.402P standing on its own, not *Reed II*. Indeed, *Reed I remanded* the issue raised in the petition, App. 87a, as Judge Watford recognized in his *Reed II* dissent:

> What we did not decide in *Reed I* is whether § 4.402(P) is impermissibly content-based when viewed in relation to the other provisions of Gilbert's sign ordinance. In particular, we noted that the district court had not addressed plaintiffs' argument that "the ordinance unfairly discriminates among forms of noncommercial speech," by granting

> more favorable treatment to signs that Gilbert categorizes as "political" and "ideological." We therefore remanded the case for resolution of plaintiffs' "First Amendment and Equal Protection claims that the Sign Code is unconstitutional in favoring some noncommercial speech over other noncommercial speech."

App. 46a (internal citations omitted).[1]

The issue Judge Watford identified is not an "extremely limited" issue. Opp. 15. Rather, it is the mainstay of the Church's case. *Reed II* finally evaluated Respondents' Code as a whole and ruled—incorrectly and employing an errant test—that it is content-neutral. Thus, questions related to the proper test for determining content-neutrality and whether Respondents' Code satisfies that test are squarely presented in this case.

Respondents also state that after remand the Church's "only remaining claims ... were for declaratory and injunctive relief." Opp. 12. But the Church has always maintained a nominal damages claim. ER 781 (praying that the "Court award nominal ... damages"); Pls' Mot. for Summ. Judg. 1, Case No. 2:07-cv-00522-SRB, ECF No. 100 (moving the lower court to enjoin Respondents' Code, declare

---

[1] Thus, Respondents are quite wrong to suggest that the arguments the Church raised in its petition have been "rejected twice by the district court and twice by two different panels of the Ninth Circuit." Opp. i. Rather, the first district and appellate opinions in this case did not even address the issue.

it unconstitutional, and "*award nominal damages to the Plaintiffs*") (emphasis added).

Respondents also claim that "[f]rom the outset, Petitioners have argued that their off-site signs are 'temporary directional signs' under § 4.402P" Opp. 2. Rather, the Church consistently asserted that its signs are religious speech entitled to full First Amendment protection. *See* Pet. 12; *see also* App. 128a & n.3 ("It is beyond dispute that [the Church's] signs communicate a religious message" and that they therefore "fall within the category of protected speech."). It is Respondents that classify signs based on content and place the Church's signs in the "Qualifying Event" sign category.

Respondents further state that they "never enforced amended § 4.402P against [the Church]." Opp. 6-7. But the threat of enforcement is plainly ongoing since Respondents twice cited the Church for violating the original version of § 4.402P and their Code Compliance Department "told [the Church] that [it] would continue to be cited if [it] posted signs in violation of § 4.402P" App. 117a.

Moreover, Respondents allege that political signs are only permitted "during a four-month period every two years." Opp. 8. The Code proves otherwise. *See* Pet. 9 & n.1 (noting that candidates that win primaries may display their signs for five months total and that Arizona law specifies four days evenly spread throughout the year for elections

to occur, thus permitting political signage year round).[2]

III. The Decision Below Exacerbates a Longstanding, Entrenched, and Well-Acknowledged Circuit Conflict.

Respondents say the circuit conflict identified in the petition is "non-existent" and "manufacture[d]." Opp. 1. But Respondents conceded its existence in the court below. Specifically, they stated the following:

> The so-called "circuit split" that Plaintiffs try to identify is among those circuits that apply "an absolutist reading of content neutrality" , *see e.g.*, *Neighborhood Enterprises, Inc. v. City of St. Louis*, 644 F.3d 728, 736-37 (8th Cir. 2011) and *Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250, 1263-66 (11th Cir. 2005), with the majority of circuits that employ "a more practical test for assessing content neutrality" as counseled by the Supreme Court in *Hill*. *See Clatterbuck v. City of Charlottesville*, 708 F.3d 549, 556 (4th Cir. 2013); *Brown v. Town of Cary*, 706 F.3d 294, 302 (4th Cir. 2013) (citing *G.K. Ltd.* and *Reed I*); *Asgeirsson v. Abbott*, 696 F.3d 454, 460 (5th Cir. 2012); *ACLU v. Alvarez*, 679 F.3d 583, 603 (7th Cir. 2012); *Melrose, Inc. v.*

---

[2] Respondents also provide a laundry list of other methods the Church could use to advertise its services. Opp. 5-7. But these alternative methods are equally available to political, ideological, and other temporary sign placers, yet they receive far more favorable treatment for their signs than the Church.

> *City of Pittsburgh*, 613 F.3d 380, 389 (3d Cir. 2010); *H.D.V.-Greektown, LLC v. City of Detroit*, 568 F.3d 609, 622 (6th Cir. 2009). The Ninth Circuit is part of the majority of circuits that follows the latter approach, as the panel explained, and has been part of this majority since *G.K. Ltd.*

Defs.' Resp. to Pet. for Reh'g En Banc 9, 9th Cir. Case No. 11-15588, ECF No. 36. While the Church disagrees with Respondents' framing of the tests that make up the conflict and which test is followed by the majority of courts, Respondents have plainly conceded the conflict exists and that the Ninth Circuit's opinion below falls on one side of it.

Respondents' concession is well-taken, considering that courts, commentators, and the prominent First Amendment scholars who filed an *amicus curiae* brief in support of the Church all agree that the conflict exists and urgently needs resolution. Indeed, *Brown*, which Respondents rely upon to claim the conflict is manufactured, plainly cuts the other way. That case highlights the circuit conflict over the proper test for evaluating content-neutrality. 706 F.3d at 302. It explained that the test employed by the Fifth, Eighth, and Eleventh Circuits conflicts with the test employed by it and several other circuits, including the Ninth Circuit. *Id.*[3] Respondents' assertion that the Church has concocted a circuit conflict is thus rejected by their

---

[3] While the Fourth Circuit decided *Brown* before *Reed II*, the court nonetheless recognized the Ninth Circuit's shift to a motive-sensitive test was already underway. After *Reed II*, that shift is now complete.

own authority. *See also H.D.V.-Greektown, LLC v. City of Detroit*, 568 F.3d 609, 622-23 (6th Cir. 2009) (noting the Sixth Circuit's conflict with the Eleventh Circuit over the proper content-neutrality test).

Moreover, the circuit conflict identified in the petition has been highlighted in academic journals. Brian Connolly rightly observes that "[t]here has been a divergence in the judicial treatment of sign regulations, with some courts applying strict prohibitions against regulations that distinguish among signs based on content, and other courts using a more relaxed standard." Environmental Aesthetics and Free Speech: Toward a Consistent Content Neutrality Standard for Outdoor Sign Regulation, 2 Mich. J. Envtl. & Admin. L. 185, 189 (2012).

The article explains that the First, Eighth, and Eleventh circuits follow the former approach, while the Third, Sixth, and Seventh circuits follow the latter. *Id.* at 197-98 & n. 74-75. The article also notes that the Ninth Circuit previously "adhered to the stricter approach to determining content-neutrality," but that its more recent decisions have moved away from that standard. *Id.* at 198 n. 75. The Ninth Circuit's decision below emphatically rejected the strict approach that court previously employed and placed it firmly on the other (and wrong) side of this critical circuit conflict.

The ideologically-diverse First Amendment scholars who filed an amicus brief in support of the Church also recognize that the decision below magnifies an entrenched circuit conflict. The

scholars observed that the Ninth Circuit found an "indubitably content-based" ordinance content-neutral and in the process

> exacerbated a three-way split among eight circuits. Some circuit court decisions, including the decision below, seem to be focusing on occasional remarks in this Court's cases about the importance of whether speech was restricted because of legislative hostility to its message. But those decisions are ignoring the many precedents from this Court striking down content-based laws regardless of the absence of any such hostility. This Court ought to grant certiorari to resolve this split, and to reaffirm the importance of treating content-based speech restrictions as presumptively unconstitutional.

See Professors Br. 2-3, 10.

Respondents further argue that the decision below did not employ a motive-based test, so it cannot magnify the above circuit conflict. Opp. 16. But the Ninth Circuit held that the code was content-neutral because "Gilbert did not adopt its regulation of speech because it disagreed with the message conveyed." App. 31a. Amici First Amendment scholars too observed that the court's finding of a lack of discriminatory motive was crucial to its content-neutrality ruling: "The panel majority's reasoning apparently rested on the conclusions that the Town was not motivated by a desire to 'suppress certain ideas,' by 'disagreement

with the message [the speech] conveys,' or by any other 'illicit motive.'" Professors Br. 3 & n. 2.

Respondents' view also appears to be that the Ninth Circuit employs a motive-plus test, *i.e.*, if the government asserts "a content-neutral motive," "further analysis is required" to determine whether the Code is content-based. Opp. 19. Respondents thus concede that legislative motive plays a pivotal role in the Ninth Circuit's analysis. Moreover, even their description of the court's test puts it into direct conflict with the objective test employed by the First, Second, Eighth, and Eleventh Circuits, under which a sign code is content-based if it makes content-based distinctions on its face, regardless of governmental motive.

The simple truth is this: Respondents' Sign Code would be stricken as a content-based speech regulation in some circuits, yet was upheld as a content-neutral regulation in the Ninth Circuit—and would be in some other circuits as well. For example, in *National Advertising Company v. Town of Babylon*, 900 F.2d 551 (2d Cir. 1990), the preferential treatment of political (and a few other) noncommercial signs over other noncommercial signs resulted in a sign code being stricken as a content-based regulation. *Id.* at 557 (code "impermissibly discriminate[d] between types of noncommercial speech" by exempting "political signs and ... signs identifying a grand opening, parade, festival, fund drive or other similar occasion" from a general sign ban). Yet here, the Ninth Circuit held that Respondents' preferential treatment of temporary political, ideological (and other)

noncommercial signs over the Church's signs is a permissible content-neutral regulation.

Lower courts are in conflict over the proper test for evaluating content-neutrality, which is resulting in different outcomes regarding materially similar sign codes. This Court's review is needed to resolve this circuit conflict, which concerns a crucial First Amendment question.

IV. The Ninth Circuit's Decision Conflicts With This Court's Precedent.

The circuit conflict described in the petition and above clearly warrants this Court's attention. Yet this conflict is not "the sole basis for Petitioners' request for the Court's review." Opp. 1. The court below also decided an important constitutional question in a way that directly conflicts with this Court's precedent. Pet. 27-36; *see* S. Ct. Rule 10(c).

That the Ninth Circuit decided an important constitutional question cannot be gainsaid. The First Amendment scholars stress this in their amicus brief: "The distinction between content-based and content-neutral restrictions has emerged as one of the most important rules of First Amendment law [T]his Court has repeatedly stressed to lower courts the significance of this distinction." Professors Br. 9-10.

Respondents claim that the Ninth Circuit's opinion is consistent with *Hill v. Colorado*, 530 U.S. 703 (2000), but fail to address the numerous decisions of this Court with which it directly

conflicts. *See* Pet. 27-34 (discussing cases); Professors Br. 3-10 (discussing additional cases). What is more, *Hill* does not support the decision below. The statute in *Hill* was found to be content-neutral because it regulated a particular mode of expression without regard to the subject of a speaker's message. *Id.* at 723 (noting that the statute "places no restrictions on—and clearly does not prohibit—either a particular viewpoint or any subject matter that may be discussed by a speaker").

Here, Respondents' Code makes content-based distinctions within the same mode of expression—temporary signage. Respondents also remark that in *Hill* the "cursory examination" of particular speech did not render the law content-based. But that was only because the examination's sole purpose was to determine if the speech was conveyed through a particular mode of expression. In stark contrast, Respondents' Code requires an examination of *the subject matter* of a temporary sign because what it says determines how it is treated. That is classic content-based discrimination.

CONCLUSION

For the foregoing reasons, the Church respectfully requests that this Court grant review.

Respectfully submitted,

Kevin H. Theriot
Jeremy D. Tedesco
Alliance Defending Freedom
15100 N. 90th Street
Scottsdale, AZ 85260
(480) 444-0020

David A. Cortman
Counsel of Record
Rory T. Gray
Alliance Defending Freedom
1000 Hurricane Shoals Rd.
N.E., Ste. D-1100
Lawrenceville, GA 30043
dcortman@alliance
defendingfreedom.org
(770) 339-0774

March 5, 2014

AMICUS CURIAE BRIEF

RECORD AND BRIEFS

MOTION FILED

NOV 19 2013

No. 13-502

IN THE

Supreme Court of the United States

PASTOR CLYDE REED AND
GOOD NEWS COMMUNITY CHURCH,
Petitioners,

v.

TOWN OF GILBERT, ARIZONA
AND ADAM ADAMS, IN HIS OFFICIAL CAPACITY
AS CODE COMPLIANCE MANAGER,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE AND BRIEF *AMICI CURIAE* OF PROFESSORS ASHUTOSH BHAGWAT, ERIC FREEDMAN, RICHARD GARNETT, SETH KREIMER, NADINE STROSSEN, WILLIAM VAN ALSTYNE, AND JAMES WEINSTEIN IN SUPPORT OF PETITIONERS

EUGENE VOLOKH
Counsel of Record
UCLA SCHOOL OF LAW
FIRST AMENDMENT
AMICUS BRIEF CLINIC
405 Hilgard Ave.
Los Angeles, CA 90095
(310) 206-3926
volokh@law.ucla.edu

Counsel for Proposed Amici Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

Library of Congress
Law Library

MOTION FOR LEAVE TO FILE

Professors Ashutosh A. Bhagwat, Eric M. Freedman, Richard Garnett, Seth F. Kreimer, Nadine Strossen, William W. Van Alstyne, and James Weinstein respectfully move for leave to file an *amici curiae* brief in support of Petitioners, pursuant to Supreme Court Rule 37.2(b).

Professor Ashutosh A. Bhagwat is Professor of Law at UC Davis School of Law.

Professor Eric M. Freedman is the Maurice A. Deane Distinguished Professor of Constitutional Law at Hofstra University School of Law.

Professor Richard Garnett is Professor of Law at the University of Notre Dame School of Law.

Professor Seth F. Kreimer is the Kenneth W. Gemmill Professor of Law at the University of Pennsylvania Law School.

Professor Nadine Strossen is Professor of Law at New York Law School and the former President of the American Civil Liberties Union, 1991-2008.

Professor William W. Van Alstyne is the Lee Professor of Law, Emeritus at William & Mary School of Law.

Professor James Weinstein is the Amelia Lewis Professor of Constitutional Law at Arizona State University's Sandra Day O'Connor School of Law.

All of the *amici* have written extensively on the First Amendment. All are concerned that the decision below, and other circuit decisions identified in the Petition for Certiorari, sharply deviate from this Court's precedents and risk eroding the critical distinction between content-based speech restrictions and content-neutral ones. Proposed *amici* believe that their perspective as scholars who have no connection with

either party can be of help to this Court in evaluating the Petition for Certiorari. Proposed *amici* therefore ask this Court for leave to file this brief *amicus curiae*.

Respectfully submitted.

EUGENE VOLOKH
Counsel of Record
UCLA SCHOOL OF LAW
FIRST AMENDMENT
AMICUS BRIEF CLINIC
405 Hilgard Ave.
Los Angeles, CA 90095
(310) 206-3926
volokh@law.ucla.edu

Counsel for Proposed Amici Curiae

QUESTION PRESENTED

Is a sign ordinance that regulates the size, location, and permissible duration of posting based on the message a sign conveys a content-based regulation under the first amendment?

TABLE OF CONTENTS

QUESTION PRESENTED i
TABLE OF CONTENTS ii
TABLE OF AUTHORITIES iii
INTEREST OF THE *AMICI CURIAE* 1
SUMMARY OF ARGUMENT 2
ARGUMENT 3
CONCLUSION 11

TABLE OF AUTHORITIES

Page(s)

Cases

Arkansas Writers' Project, Inc. v. *Ragland*, 481 U.S. 221 (1987) 8, 10

Buckley v. *Am. Constitutional Law Found.*, 525 U.S. 182 (1999) 6

Burson v. *Freeman*, 504 U.S. 191 (1992) 5

Carey v. *Brown*, 447 U.S. 455 (1980) 9

City of Cincinnati v. *Discovery Network*, 507 U.S. 410 (1993) 8, 9

City of Los Angeles v. *Alameda Books, Inc.*, 535 U.S. 425 (2002) 9

Consolidated Edison Co. of N.Y. v. *Public Service Comm'n of N.Y.*, 447 U.S. 530 (1980) 6

Lehman v. *Shaker Heights*, 418 U.S. 298 (1974) 6

McIntyre v. *Ohio Elec. Comm'n*, 514 U.S. 334 (1995) 4, 5

Perry Educ. Ass'n v. *Perry Local Educators' Ass'n*, 460 U.S. 37 (1983) 6

Reed v. *Town of Gilbert*, 587 F.3d 966 (9th Cir. 2009) 4

Regan v. *Time, Inc.*, 468 U.S. 641 (1984) 7

Ward v. *Rock Against Racism*, 491 U.S. 781 (1989) 10

Articles

Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. Chi. L. Rev. 413 (1996) 10

Leslie Kendrick, *Content Discrimination Revisited*, 98 Va. L. Rev. 231 (2012) 10

Seth F. Kreimer, *Good Enough for Government Work: Two Cheers for Content Neutrality*, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2337499 (University of Pennsylvania Law School working paper) 10

Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 Wm. & Mary L. Rev. 189 (1983) 10

Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. Chi. L. Rev. 46 (1987) 10

INTEREST OF THE *AMICI CURIAE*

Professor Ashutosh A. Bhagwat is Professor of Law at UC Davis School of Law.

Professor Eric M. Freedman is the Maurice A. Deane Distinguished Professor of Constitutional Law at Hofstra University School of Law.

Professor Richard Garnett is Professor of Law at the University of Notre Dame School of Law.

Professor Seth F. Kreimer is the Kenneth W. Gemmill Professor of Law at the University of Pennsylvania Law School.

Professor Nadine Strossen is Professor of Law at New York Law School and the former President of the American Civil Liberties Union, 1991-2008.

Professor William W. Van Alstyne is the Lee Professor of Law, Emeritus at William & Mary School of Law.

Professor James Weinstein is the Amelia Lewis Professor of Constitutional Law at Arizona State University's Sandra Day O'Connor School of Law.

All of the *amici* have written extensively on the First Amendment. All are concerned that the decision below, and other circuit decisions identified in the Petition for Certiorari, sharply deviate from this Court's precedents and risk eroding the critical distinction between content-based speech restrictions and content-neutral ones.[1] *Amici* believe that their perspec-

[1] No counsel for a party authored this brief in whole or part, nor did any person or entity, other than *amici* or their counsel,

tive as scholars who have no connection with either party can be of help to this Court in evaluating the Petition for Certiorari.

SUMMARY OF ARGUMENT

The speech restriction in this case, which distinguishes (1) signs "support[ing] candidates" or relating to "any other matter on the ballot," (2) "sign[s] communicating a message or ideas," and (3) signs related to noncommercial "event[s]," is facially content-based. It may well not turn on the viewpoint of speech, or be motivated by legislative disagreement with certain ideas. Yet many precedents from this Court have made clear that such content classifications make a law content-based, even in the absence of improper legislative motive.

Nonetheless, the Ninth Circuit panel majority in this case treated this content-based law as content-neutral, and in the process exacerbated a three-way split among eight circuits. Some circuit court decisions, including the decision below, seem to be focusing on occasional remarks in this Court's cases about the importance of whether speech was restricted because of legislative hostility to its message. But those decisions are ignoring the many precedents from this Court striking down content-based laws regardless of the absence of any such hostility. This Court ought to grant certiorari to resolve this split, and to reaffirm

---

make a monetary contribution to the preparation or submission of this brief. The parties' counsel of record received timely notice of the intent to file the brief under Rule 37. Petitioners have consented to this filing, but respondents have not.

the importance of treating content-based speech restrictions as presumptively unconstitutional.

ARGUMENT

This should have been an easy case. The Town's sign code facially discriminates based on the content of signs, expressly distinguishing

1. "temporary sign[s] which support[] candidates for office or urge[s] action on any other matter on the ballot," which can be up to 32 square feet in size,
2. "sign[s] communicating a message or ideas for noncommercial purposes" that are not related to a "qualifying event," which can be up to 20 square feet in size, and
3. noncommercial signs that do relate to a "qualifying event," which can only be up to 6 square feet in size.

Under this Court's precedents, the law is therefore content-based. Yet the Ninth Circuit panel majority concluded the law was content-neutral—and the three-way, eight-circuit split identified by the petition has led many other courts to make similar errors. See Pet. for Cert. 18.

The panel majority's reasoning apparently rested on the conclusions that the Town was not motivated by a desire "to suppress certain ideas," by "disagreement with the message [the speech] conveys," or by any other "illicit motive," and that the law was *view-*

point-neutral.[2] Yet this Court has repeatedly made clear that laws distinguishing speech based on content—specifically including laws distinguishing campaign-related speech from other speech—are content-based even if they are viewpoint-neutral and not prompted by any motive to suppress particular ideas.

Thus, for example, in *McIntyre* v. *Ohio Elec. Comm'n*, 514 U.S. 334 (1995), this Court held that a law requiring campaign literature to be signed was content-based. Part of the reason was that "the category of covered documents is defined by their content—only those publications containing speech designed to influence the voters in an election need bear the required markings." *Id.* at 345. This was so "even though [the] provision applie[d] evenhandedly to advocates of differing viewpoints." *Id.* And because of this content discrimination, the law was subject not to intermediate scrutiny, but to "exacting scrutiny."

---

[2] *See Reed* v. *Town of Gilbert*, 587 F.3d 966, 975 (9th Cir. 2009) ("Nothing in the regulation suggests any intention by Gilbert to suppress certain ideas through the Sign Code, nor does Good News claim that Gilbert had any illicit motive in adopting the ordinance."); Pet. 2a (treating the 2009 decision as law of the case); Pet. 65a (viewing the proper test as turning on "whether the government has adopted a regulation of speech because of disagreement with the message it conveys" (quotation marks and citations omitted)); Pet. 29a ("Gilbert's Sign Code places no restrictions on the particular viewpoints of any person or entity that seeks to erect a Temporary Directional Sign"); Pet. 32a ("Because Gilbert's Sign Code places no restrictions on the particular viewpoints of any person or entity that seeks to erect a Temporary Directional Sign and the exemption applies to all, it is content-neutral as that term has been defined by the Supreme Court.").

Id. at 346 (internal quotation marks omitted). Likewise, in this case the category of specially treated signs "is defined by their content"—"only those [signs] containing speech designed to influence the voters in an election" may be over 20 square feet in area.

Similarly, in *Burson* v. *Freeman*, 504 U.S. 191 (1992), this Court treated a restriction on electioneering within 100 feet of a polling place as content-based:

> "Whether individuals may exercise their free speech rights near polling places depends entirely on whether their speech is related to a political campaign. * * * This Court has held that the First Amendment's hostility to content-based regulation extends not only to a restriction on a particular viewpoint, but also to a prohibition of public discussion of an entire topic."

Id. at 197 (plurality opinion); see also *id.* at 214 (Scalia, J., concurring in the judgment) (agreeing that the law was "content based"); *id.* at 217 (Stevens, J., dissenting) (stating that the law "regulates expression based on its content").[3]

Likewise, in this case, "whether individuals may exercise their free speech rights [using large signs]

---

[3] Though the law was ultimately upheld by this Court, all the Justices agreed it was content-based. The plurality and the dissent agreed the proper test was strict scrutiny, because the law was based on the content of speech. 504 U.S. at 214, 217. Justice Scalia's concurrence treated the law as a permissible regulation of speech in a nonpublic forum, but agreed that it was content-based. *Id.* at 214.

depends entirely on whether their speech is related to a political campaign," and "whether individuals may exercise their free speech rights [using medium-sized signs] depends entirely on whether their speech is related to [a specific event]." Yet "the First Amendment's hostility to content-based regulation extends [beyond] restriction[s] on a particular viewpoint," and includes regulation based on whether speech relates to an election, to ideology generally, or to a "qualifying event."

Similarly, *Consolidated Edison Co. of N.Y.* v. *Public Service Comm'n of N.Y.*, 447 U.S. 530, 539 (1980), and *Perry Educ. Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 60 (1983), made clear that an exclusion of all political advertising from a city-owned bus system was content-based. This Court had upheld such an exclusion in *Lehman* v. *Shaker Heights*, 418 U.S. 298 (1974), based on the city's power as a proprietor of a nonpublic forum. *Id.* at 302 (plurality opinion); *id.* at 306 (Douglas, J., concurring in the judgment). But *Consolidated Edison* and *Perry* make clear that the exclusion was upheld *in spite* of being content-based, solely because of this extra government power over nonpublic fora (a power that is not implicated in this case).

To be sure, the restrictions in *McIntyre*, *Burson*, and *Lehman* treated election-related speech or political speech worse than speech with other content, and the restriction in *Reed* treats election-related speech better. But the analytical question whether the restriction is content-based must be the same whether the restriction favors a category of speech or disfavors it. See also *Buckley* v. *Am. Constitutional Law Found.*, 525 U.S. 182, 209 (1999) (Thomas, J., concur-

ring in the judgment) (treating a law as content-based because "the category of burdened speech is defined by its content—Colorado's badge requirement does not apply to those who circulate candidate petitions, only to those who circulate initiative or referendum proposals").

This Court has likewise treated as content-based many other restrictions that seem highly unlikely to have been motivated by a desire to suppress particular ideas. For example, in *Regan* v. *Time, Inc.*, 468 U.S. 641 (1984), this Court struck down a statutory provision that limited photographic reproductions of United States currency, but exempted reproductions "for philatelic, numismatic, educational, historical, or newsworthy purposes to content that was educational or newsworthy." *Id.* at 644. This Court held that the law was content-based, because "[a] determination concerning the newsworthiness or educational value of a photograph cannot help but be based on the content of the photograph and the message it delivers." *Id.* at 648.

The statutory exemption was likely not prompted by hostility to any particular views, or even to any particular subjects. Yet this Court treated the law as content-based. Likewise, just as in *Regan* v. *Time, Inc.*, the determination of whether a sign in Gilbert can be up to 30 square feet or at most 24 or even just 6 square feet "cannot help but be based on the content" of the message the sign delivers.

Even where signs concern commercial speech, this Court has struck down speech restrictions that discriminate based on the content of the sign. In *City of Cincinnati* v. *Discovery Network*, 507 U.S. 410

(1993), the government, motivated by safety and aesthetic concerns, barred the distribution of commercial publications through freestanding newsracks on public sidewalks. *Id.* at 412-14. In striking down this ordinance, this Court noted that there was no evidence that the city acted with any animus toward the ideas in respondents' publications. *Id.* at 429. But the decision nonetheless rejected the view that "discriminatory treatment is suspect under the First Amendment only when the legislature intends to suppress certain ideas." *Id.*

As in *Discovery Network*, the town of Gilbert might not have had illicit motives in enacting the Sign Ordinance. But that should be just as irrelevant here as in that case. And if the regulation in *Discovery Network* was content-based even as to commercial speech, surely Gilbert's Sign Code must be content-based when it discriminates based on content among noncommercial speech.

Similarly, in *Arkansas Writers' Project, Inc.* v. *Ragland*, 481 U.S. 221 (1987), this Court struck down as unconstitutionally content-based a state sales tax exemption for "religious, professional, trade, and sports journals." There was no evidence of any improper censorial motive. *Id.* at 228. Still, this Court held that, because Arkansas "enforcement authorities must necessarily examine the content of the message that is conveyed" to determine a magazine's tax status, the basis on which Arkansas differentiates between magazines is "particularly repugnant to First Amendment principles." *Id.* at 228-29.

To give just two more examples, in *Police Department of Chicago* v. *Mosley*, 408 U.S. 92 (1972),

and *Carey* v. *Brown*, 447 U.S. 455 (1980), this Court viewed as content-based restrictions that banned all picketing in certain places (near schools and residences, respectively), but exempted labor picketing. Those restrictions were doubtless not motivated by hostility to all non-labor-picketing views. Nonetheless, because they distinguished speech based on content, they were treated as content-based. 408 U.S. at 99; 447 U.S. at 460.

To be sure, this Court has at times treated as content-neutral laws that are seen as focusing on the "secondary effects" of speech. See *City of Los Angeles* v. *Alameda Books, Inc.*, 535 U.S. 425, 445-47 (2002) (Kennedy, J., concurring in the judgment) (discussing this doctrine). But political signs, ideological signs, and event signs are no different in any of their possible "secondary effects."

In this respect, this case is just like *Discovery Network* (though involving fully protected speech, not just commercial speech). In *Discovery Network*, this Court noted that, "[i]n contrast to the speech at issue in [*City of Renton* v. *Playtime Theatres, Inc.*], there are no secondary effects attributable to respondent publishers' newsracks that distinguish them from the newsracks Cincinnati permits to remain on its sidewalks." *Discovery Network*, 507 U.S. at 430. Likewise, there are no secondary effects attributable to Reed's signs promoting religious events that distinguish them from the political signs that the Town of Gilbert allows to be much larger.

The distinction between content-based and content-neutral restrictions has emerged as one of the most important rules of First Amendment law.

See, *e.g.*, Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. Chi. L. Rev. 413, 443 (1996); Leslie Kendrick, *Content Discrimination Revisited*, 98 Va. L. Rev. 231, 237 (2012); Seth F. Kreimer, *Good Enough for Government Work: Two Cheers for Content Neutrality*, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2337499 (University of Pennsylvania Law School working paper); Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 Wm. & Mary L. Rev. 189 (1983); James Weinstein, *How Theory Matters: A Commentary on Robert Sedler's "The 'Law of the First Amendment' Revisited,"* 58 Wayne L. Rev. 1105, 1139 (2013). And this Court has repeatedly stressed to lower courts the significance of this distinction.

Yet the decision below, alongside many other circuit court opinions, calls content-neutral that which is indubitably content-based. See Pet. 50a (Watford, J., dissenting). Those circuit courts have picked up on some remarks in this Court's jurisprudence that might seem to call for an inquiry into legislative motivation. *See, e.g.*, Pet. 30a (focusing on "whether the government has adopted a regulation of speech because of disagreement with the message it conveys") (citing *Hill* v. *Colorado*, 530 U.S. 703, 719 (2000), and *Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989)). But those courts have failed to apply the many precedents from this Court cited above, precedents that *Hill* and *Ward* were obviously not seeking to overturn. This Court should grant certiorari in this case, to clarify the content discrimination standard both for sign cases and for free speech cases more broadly.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari, and resolve the three-way, eight-circuit split identified in the petition.

Respectfully submitted.

EUGENE VOLOKH
Counsel of Record
UCLA SCHOOL OF LAW
FIRST AMENDMENT
AMICUS BRIEF CLINIC
405 Hilgard Ave.
Los Angeles, CA 90095
(310) 206-3926
volokh@law.ucla.edu

Counsel for Amici Curiae

JOINT APPENDIX

RECORD AND BRIEFS

Supreme Court, U.S.
FILED
SEP 15 2014
OFFICE OF THE CLERK

No. 13-502

IN THE

Supreme Court of the United States

PASTOR CLYDE REED; AND GOOD NEWS COMMUNITY CHURCH,

Petitioners,

v.

TOWN OF GILBERT, ARIZONA; AND ADAM ADAMS, IN HIS OFFICIAL CAPACITY AS CODE COMPLIANCE MANAGER,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

JOINT APPENDIX

David A. Cortman
Counsel of Record
Alliance Defending Freedom
1000 Hurricane Shoals Rd.
N.E., Ste. D-1100
Lawrenceville, GA 30043
dcortman@alliancedefendingfreedom.org
(770) 339-0774

Kevin H. Theriot
Jeremy D. Tedesco
Alliance Defending Freedom
15100 N. 90th Street
Scottsdale, AZ 85260
(480) 444-0020

Counsel for Petitioners

Philip W. Savrin
Counsel of Record
Freeman Mathis & Gary, LLP
100 Galleria Pkwy, Ste 1600
Atlanta, Ga. 30339-5948
psavrin@fmglaw.com
(770) 818-1405

Robert Grasso, Jr.
Kim S. Alvarado
Jenny J. Winkler
Grasso Law Firm, P.C.
2430 West Ray Road, Suite 3
Chandler, Arizona 85224
(480) 730-5553

Counsel for Respondents

Petition for Writ of Certiorari filed October 21, 2013
Petition for Writ of Certiorari granted July 1, 2014

TABLE OF CONTENTS

Relevant Docket Entries United States District Court District of Arizona, Case No. 2:07-cv-00522-SRB 1

Relevant Docket Entries United States Court of Appeals for the Ninth Circuit, Case No. 08-17384 15

Relevant Docket Entries United States Court of Appeals for the Ninth Circuit, Case No. 11-15588 19

Excerpts of Article 4.4, Sign Regulations, of the Town's Land Development Code (ER 540-568) 25

Excerpts of the Glossary of General Terms to the Town's Land Development Code (ER 619-626) 56

Ordinance No. 2112 – Amendments to Sections 4.402(D) and (P) and Glossary of General Terms of the Land Development Code, dated January 8, 2008 (ER 632-636) 73

Excerpts of the 2011 Sign Code Zoning Code Text Amendments, October 6, 2011 80

Amended Verified Complaint for Declaratory and Injunctive Relief and Exhibits 4-6 (ER 765-783, 862, 864, 866-869) 95

Answer to Amended Verified Complaint (ER 742-763) 133

Exhibit 1 to Plaintiffs' Second Motion for Preliminary Injunction and Memorandum of Law in Support (ER 872-873) 165

The following items were reproduced in the Appendices to the Petition for Writ of Certiorari and are not reproduced here:

Ninth Circuit Opinion Affirming District Court's Summary Judgment Ruling (02/08/13) 1a

District Court Order Denying Plaintiff's Motion for Summary Judgment and Granting Defendants' Motion for Summary Judgment (02/11/11) 53a

Ninth Circuit Opinion Affirming in part and Remanding in part District Court's Preliminary Injunction Ruling (11/20/09) 85a

Order Denying Plaintiffs' Second Motion for Preliminary Injunction (09/30/08) 116a

Docket Entries:
United States District Court for the
District of Arizona
No. 2:07-cv-00522-SRB

Date Filed	#	Docket Text
03/08/2007	1	COMPLAINT, filed by Clyde Reed, Good News Presbyterian Church. (Attachments: # 1 Civil Cover Sheet)(Tedesco, Jeremy) (Entered: 03/08/2007)
		* * *
03/30/2007	8	MOTION for Preliminary Injunction *and Supporting Memorandum of Law* by Clyde Reed, Good News Presbyterian Church. (Attachments: # 1 Exhibit Exhibits 1-5# 2 Exhibit Exhibit 6)(Tedesco, Jeremy) (Entered: 03/30/2007)
		* * *
05/09/2007	19	ORDER ON STIPULATED PRELIMINARY INJUNCTION. ORDERED withdrawing 8 Plaintiffs' Motion for Preliminary Injunction; granting 12 Motion for Preliminary Injunction. Defendants shall be enjoined from enforcing Chapter I, 4.402(P) of Defendants' Land Development Code against Plaintiffs pending the outcome of

Date Filed	#	Docket Text
		this litigation; Plaintiffs shall not be required to give security pursuant to Fed.R.Civ.P 65(d). Signed by Judge Susan R Bolton on 5/7/07.(TLJ) (Entered: 05/09/2007)
		* * *
05/11/2007	21	ORDERED that discovery and all deadlines set in this Court's 5/2/07 Order setting Rule 16 Scheduling Conference are stayed until such time as the Town of Gilbert amends and adopts its sign ordinance; the Rule 16 conference set for 6/18/07 is vacated; and the parties must notify the Court regarding the status of settlement negotiations within 14 days of the Town of Gilbert's adoption of the new sign ordinance. Signed by Judge Susan R Bolton on 5/11/07. (TLJ) (Entered: 05/11/2007)
		* * *
01/10/2008	23	MOTION to Amend/Correct re Verified Complaint by Clyde Reed, Good News Presbyterian Church. (Attachments: # 1 Exhibit 1 Proposed Amended Complaint, # 2 Text of Proposed Order)(Tedesco, Jeremy) (Entered: 01/10/2008)

Date Filed	#	Docket Text
01/10/2008	24	LODGED Proposed Amended Verified Complaint re: 23 MOTION to Amend/Correct re Verified Complaint. Document to be filed by Clerk if Motion to Leave to File or Amend is granted. Filed by Clyde Reed, Good News Presbyterian Church. (Attachments: # 1 Exhibit 1-6)(Tedesco, Jeremy) (Entered: 01/10/2008)
01/10/2008	25	Notice re Plaintiffs' Notice that Defendants' Amended Code Fails to Resolve This Case by Clyde Reed, Good News Presbyterian Church re 21 Order, Terminate Hearings, (Tedesco, Jeremy) (Entered: 01/10/2008)
01/10/2008	26	Second MOTION for Preliminary Injunction *and Supporting Memorandum of Law* by Clyde Reed, Good News Presbyterian Church. (Attachments: # 1 Exhibit 1-4, # 2 Text of Proposed Order)(Tedesco, Jeremy) (Entered: 01/10/2008)
		* * *
02/08/2008	29	Notice re Defendants Notice of Non-Opposition To Plaintiffs Motion For Leave To File Amended Verified Complaint by

Date Filed	#	Docket Text
		Gilbert, Town of, Adam Adams re 23 MOTION to Amend/Correct re Verified Complaint (Alvarado, Kim) (Entered: 02/08/2008)
02/08/2008	30	RESPONSE to Motion re 26 Second MOTION for Preliminary Injunction *and Supporting Memorandum of Law Defendants Response To Plaintiffs Second Motion For Preliminary Injunction* filed by Gilbert, Town of, Adam Adams. (Attachments: # 1 Exhibit Index and Exhibit A)(Alvarado, Kim) (Entered: 02/08/2008)
02/12/2008	31	ORDER IT IS ORDERED granting Plaintiffs' 23 Motion for Leave to File Amended Verified Complaint. Signed by Judge Susan R Bolton on 2/12/08.(SAT) (Entered: 02/12/2008)
02/12/2008	32	FIRST AMENDED VERIFIED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF against Gilbert, Town of, Adam Adams, filed by Clyde Reed, Good News Presbyterian Church. (Attachments: # 1 Exhibits) (SAT) Modified on 2/13/2008, DOCKET MODIFIED TO ADD Good News Community Church

Date Filed	#	Docket Text
		and TERMINATE Good News Presbyterian Church TO THIS CASE,(LSP).(Entered: 2/12/2008)
02/15/2008	33	REPLY to Response to Motion re 26 Second MOTION for Preliminary Injunction *and Supporting Memorandum of Law* filed by Good News Community Church, Clyde Reed. (Tedesco, Jeremy) (Entered: 02/15/2008)
		* * *
02/27/2008	35	ANSWER to 32 Amended Complaint, by Gilbert, Town of, Adam Adams.(Alvarado, Kim) (Entered: 02/27/2008)
		* * *
03/24/2008	37	Minute Entry. Proceedings held before Judge Susan R Bolton: Hearing held re: Plaintiffs' Second Motion for Preliminary Injunction. Argument presented. IT IS ORDERED directing counsel to file simultaneous memorandum (no responses to be filed) within 10 days of this date, not to exceed 5 pages, stating the discovery required for this case to proceed to the permanent injunction stage or whether the Court can enter a permanent injunction based on the pleadings

Date Filed	#	Docket Text
		filed by counsel. IT IS FURTHER ORDERED taking under advisement 26 Plaintiffs' Second Motion for Preliminary Injunction. (Court Reporter Kim Moll)(MAW)(Entered: 3/25/2008)
		* * *
09/30/2008	43	ORDER denying Pla's Second 26 Motion for Preliminary Injunction. Signed by Judge Susan R Bolton on 09/30/08.(ESL) (Entered: 10/01/2008)
		* * *
10/27/2008	45	NOTICE OF APPEAL to 9th Circuit, as to 43 Order on Motion for Preliminary Injunction by Good News Community Church, Clyde Reed. Filing fee received: $ 455.00, receipt number 0970000000002325156. (Tedesco, Jeremy) (Entered: 10/27/2008)
		* * *
12/18/2008	70	STIPULATION *to Stay District Court Proceedings While Plaintiffs Pursue Appeal* by Good News Community Church, Clyde Reed. Gilbert, Town of and Adam Adams. (Attachments: # 1 Text of Proposed Order) (Tedesco,

Date Filed	#	Docket Text
		Jeremy) Modified on 12/19/2008 (LAD). DOCKET TEXT MODIFIED TO REFLECT ADDITIONAL FILERS. (Entered: 12/18/2008)
12/24/2008	71	ORDER pursuant to 70 Stipulation: All proceedings in this Court are stayed until the Ninth Circuit Court of Appeals disposes of Plaintiffs' appeal of the Order denying their Second Motion for Preliminary Injunction. The Court's Rule 16 Scheduling Order 61 is hereby vacated. Signed by Judge Susan R Bolton on 12/23/08. (DNH) (Entered: 12/24/2008)
12/16/2009	72	MANDATE of 9th Circuit affirming District Court decision in part and REMANDING in part re case number 08-17384, as to 45 Notice of Appeal. (Attachments: #(1) Opinion, #(2) NDA). (LSP)(Entered: 2/16/2009)
		* * *
01/11/2010	74	Minute Entry. Proceedings held before Judge Susan R Bolton: Status Conference held on 1/11/2010 re: 9th Circuit Court of Appeals' partial remand. Discussion held. Upon stipulation of counsel, the Court sets the

Date Filed	#	Docket Text
		following deadlines: discovery to be completed by May 28, 2010; dispositive motions are to be filed no later than June 25, 2010, with response due July 30, 2010; reply due August 20, 2010. The Court is advised that the request for Preliminary Injunction will not be renewed. (Court Reporter Elizabeth Lemke)(MAW) (Entered: 01/11/2010)
		* * *
07/19/2010	93	ORDER pursuant to 91 Stipulation related to plaintiffs' claims against the original sign code: Plaintiffs will not pursue any of the relief requested in the Prayer for Relief in their Amended Verified Complaint against the Town of Gilbert's Sign Code as it existed at the time this lawsuit was commenced ("the Original Code"). Within 30 days of the entry of this Stipulated Order, Defendants will pay Plaintiffs $1.00 in satisfaction of their request for nominal damages, and $16,380.00 in satisfaction of their request for attorneys' fees and costs, in relation to their claims against the Original Code. This

Date Filed	#	Docket Text
		Order does not affect Plaintiffs' claims and the Town Defendants' defenses related to the Amended Code. Signed by Judge Susan R Bolton on 7/19/10. (DMT) (Entered: 07/19/2010)
		* * *
08/27/2010	97	Cross MOTION for Summary Judgment by Adam Adams, Gilbert, Town of. (Alvarado, Kim) Modified on 8/30/2010 CORRECTION: not text searchable (REW). (Entered: 08/27/2010)
08/27/2010	98	Separate STATEMENT of Facts In Support of Defendants' Cross-Motion for Summary Judgment re 97 Cross MOTION for Summary Judgment by Defendants Adam Adams, Gilbert, Town of. (Attachments: # 1 Exhibit Index, # 2 Exhibit A, # 3 Exhibit A, Exhibit 1, # 4 Exhibit B, # 5 Exhibit C, # 6 Exhibit D, # 7 Errata E, # 8 Exhibit F, # 9 Exhibit G)(Alvarado, Kim) Modified on 8/30/2010 CORRECTION: not text searchable (REW). (Entered: 08/27/2010)
08/27/2010	99	Joint Stipulated STATEMENT of Facts in Support of Cross-

Date Filed	#	Docket Text
		Motions for Summary Judgment re 97 , 100 Cross MOTIONS for Summary Judgment by Defendants Adam Adams, Gilbert, Town of, Plaintiffs Good News Community Church, Good News Presbyterian Church, Clyde Reed. (Attachments: # 1 Exhibit Index, # 2 Exhibit A, # 3 Exhibit B, # 4 Exhibit C)(Alvarado, Kim) Modified on 8/30/2010 CORRECTION: not text searchable; linkage added (REW). (Entered: 08/27/2010)
08/27/2010	100	MOTION for Summary Judgment *and Memorandum of Law in Support Thereof* by Good News Community Church, Clyde Reed. (Attachments: # 1 Exhibit 1 Deposition of Michael Milillo, # 2 Exhibit 2 Deposition of Karen Coats, # 3 Exhibit 3 Deposition of Adam Adams, # 4 Exhibit 4 Deposition of Steve Wallace, # 5 Exhibit 5 Builder Permits for Weekend Directional Signs, # 6 Exhibit 6 Deposition of Clyde Reed)(Tedesco, Jeremy) (Entered: 08/27/2010)
08/27/2010	101	AFFIDAVIT in Support re 100 MOTION for Summary Judgment *and Memorandum of*

Date Filed	#	Docket Text
		Law in Support Thereof filed by Good News Community Church, Clyde Reed. (Attachments: # 1 Exhibit 1-25, # 2 Exhibit 26-56)(Tedesco, Jeremy) (Entered: 08/27/2010)
08/27/2010	102	STATEMENT of Plaintiffs' Statement of Undisputed Facts re 100 MOTION for Summary Judgment *and Memorandum of Law in Support Thereof* by Plaintiffs Good News Community Church, Clyde Reed. (Tedesco, Jeremy) (Entered: 08/27/2010)
		* * *
10/01/2010	104	RESPONSE to Motion re 100 MOTION for Summary Judgment *and Memorandum of Law in Support Thereof* filed by Adam Adams, Gilbert, Town of. (Alvarado, Kim) (Entered: 10/01/2010)
10/01/2010	105	RESPONSE *to Plaintiffs' Statement of Facts re (Doc. 102) by Defendants Adam Adams, Gilbert, Town of. (Attachments: # 1 Exhibit A and B)(Alvarado, Kim) Modified on 10/4/2010 (TLJ). CORRECTIOIN to include linkage. (Entered: 10/01/2010)*
10/01/2010	106	RESPONSE to Motion re 97

Date Filed	#	Docket Text
		Cross MOTION for Summary Judgment filed by Good News Community Church, Clyde Reed. (Tedesco, Jeremy) (Entered: 10/01/2010)
10/01/2010	107	RESPONSE re 98 Statement, *of Facts* by Plaintiffs Good News Community Church, Clyde Reed. (Attachments: # 1 Exhibit 1)(Tedesco, Jeremy) (Entered: 10/01/2010)
10/29/2010	108	REPLY to Response to Motion re 97 Cross MOTION for Summary Judgment filed by Adam Adams, Gilbert, Town of. (Alvarado, Kim) (Entered: 10/29/2010)
10/29/2010	109	REPLY to Response to Motion re 100 MOTION for Summary Judgment *and Memorandum of Law in Support Thereof* filed by Good News Community Church, Clyde Reed. (Tedesco, Jeremy) (Entered: 10/29/2010)
10/29/2010	110	AFFIDAVIT in Support re 100 MOTION for Summary Judgment *and Memorandum of Law in Support Thereof (in Support of Reply)* filed by Good News Community Church, Clyde Reed. (Attachments: # 1 Exhibit 57-80, # 2 Exhibit 81-103)(Tedesco, Jeremy) (Entered:

Date Filed	#	Docket Text
		10/29/2010)
		* * *
11/22/2010	116	Minute Entry. Proceedings held before Judge Susan R Bolton: Motion Hearing held on 11/22/2010 re: Plaintiffs' Motion for Summary Judgment 100 and Defendants' Cross Motion for Summary Judgment 97 Argument held. IT IS ORDERED taking under advisement 97 Defendants' Cross Motion for Summary Judgment and taking under advisement 100 Plaintiffs' Motion for Summary Judgment. (Court Reporter Elizabeth Lemke)(MAW) (Entered: 11/22/2010)
02/11/2011	117	ORDER denying 100 Plaintiff's Pastor Clyde Reed and Good News Presbyterian Church's Motion for Summary Judgment; granting 97 Defendants the Town of Gilbert and Adam Adams' Cross-Motion for Summary Judgment and denying as moot 111 Defendants' Motion for Leave to File Objections to Admission of Evidence. The Clerk shall enter judgment in this matter in favor of Defendants. Signed by Judge Susan R Bolton on 2/11/11.(LSP)

Date Filed	#	Docket Text
		(Entered: 02/11/2011)
02/11/2011	118	CLERK'S JUDGMENT it is ordered and adjudged that pursuant to the Court's order filed February 11, 2011, judgment is entered in favor of defendants and against plaintiffs. Plaintiffs to take nothing, and complaint and action are dismissed. (LSP) (Entered: 02/11/2011)
03/11/2011	119	NOTICE OF APPEAL to 9th Circuit, as to 118 Clerk's Judgment, 117 Order on Motion for Summary Judgment Order on Motion for Miscellaneous Relief, by Good News Community Church, Clyde Reed. Filing fee received: $455.00, receipt number 0970-5016903. (Attachments: # 1 Representation Statement) (Tedesco, Jeremy) (Entered: 03/11/2011)
		* * *

Docket Entries:
United States Court of Appeals
for the Ninth Circuit
No. 08-17384

Date Filed	#	Docket Text
10/31/2008	1	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. SEND CADS: Yes. The schedule is set as follows: CADS due by Attorney Jeremy D. Tedesco due on 10/27/2008. PRELIMINARY INJUNCTION APPEAL. RULE 3-3 APPLIES (GR)
		* * *
11/24/2008	10	Filed Opening Brief [9] filed by Clyde Reed and Good News Community Church in 08-17384. Within 5 working days of the filing of this order, filer is ordered to file 10 copies of the brief in paper format, with a Blue cover, accompanied by certification that the brief is identical to the version submitted electronically. (LA)
		* * *
11/25/2008	12	Filed Appellants' excerpts of record in 2 volumes. Served on 11/24/2008 (LA)
		* * *

Date Filed	#	Docket Text
12/22/2008	14	Filed Answering Brief [13] filed by Town of Gilbert, Arizona and Adam Adams in 08-17384. Within 5 working days of the filing of this order, filer is ordered to file 10 copies of the brief in paper format, with a Red cover, accompanied by certification that the brief is identical to the version submitted electronically. (LA)
12/22/2008	15	Filed Appellees Adam Adams and Town of Gilbert, Arizona supplemental excerpts of record on appeal in 1 volume. (LA)
		* * *
01/05/2009	20	Filed Reply Brief [18] filed by Clyde Reed and Good News Community Church in 08-17384. Within 5 working days of the filing of this order, filer is ordered to file 10 copies of the brief in paper format, with a Grey cover, accompanied by certification that the brief is identical to the version submitted electronically. (LA)
		* * *
04/03/2009	30	Filed clerk order (Deputy Clerk:KKW): The Town of Gilbert has filed a motion to supplement

Date Filed	#	Docket Text
		the record, claiming that the Good News Community Church no longer holds services in Gilbert. The court reserves ruling on this motion. The parties are directed to file letter briefs no longer than ten pages before the close of business on April 9, 2009, addressing whether, as a result of changed circumstances, some or all of the claims on appeal are moot and whether the Good News Community Church lacks standing to pursue some or all of its claims. (KKW)
04/09/2009	31	Filed (ECF) Appellees Adam Adams and Town of Gilbert, Arizona Correspondence: Letter Brief Regarding Mootness And Standing. Date of service: 04/09/2009 [6878205] (KSA)
04/10/2009		Filed clerk order: Letter Brief [32] filed by Clyde Reed and Good News Community Church. (GLS)
04/15/2009	33	ARGUED AND SUBMITTED TO STEPHEN R. REINHARDT, JOHN T. NOONAN and M. MARGARET MCKEOWN. (SJ)
		* * *

Date Filed	#	Docket Text
11/20/2009	36	FILED OPINION (STEPHEN R. REINHARDT, JOHN T. NOONAN and M. MARGARET MCKEOWN) AFFIRMED IN PART; REMANDED IN PART. Each party shall bear its own costs on appeal. Judge: MMM Authoring. FILED AND ENTERED JUDGMENT. [7137558] (RP)

* * *

Docket Entries:
United States Court of Appeals
for the Ninth Circuit
No. 11-15588

Date Filed	#	Docket Text
03/11/2011	1	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. SEND MQ: Yes. The schedule is set as follows: Mediation Questionnaire due on 03/18/2011. Transcript ordered by 04/11/2011. Transcript due 05/10/2011. Appellant Good News Community Church and Appellant Clyde Reed opening brief due 06/20/2011. Appellee Adam Adams and Appellee Town of Gilbert, Arizona answering brief due 07/19/2011. Appellant's optional reply brief is due 14 days after service of the answering brief. [7677667] (RT)
		* * *
06/20/2011	7	Filed clerk order: The opening brief [6] submitted by Good News Community Church and Clyde Reed is filed. Within 7 days of the filing of this order, filer is ordered to file 7 copies of the brief in paper format, with a blue cover, accompanied by certification, attached to the end

Date Filed	#	Docket Text
		of each copy of the brief, that the brief is identical to the version submitted electronically. [7791221] (GLS)
06/21/2011	8	Filed Appellants Good News Community Church and Clyde Reed excerpts of record in 5 volumes. No proof of service. [7794726] (GLS)
		* * *
09/19/2011	14	Filed clerk order: The answering brief [13] submitted by Adam Adams and Town of Gilbert, Arizona is filed. Within 7 days of the filing of this order, filer is ordered to file 7 copies of the brief in paper format, with a red cover, accompanied by certification, attached to the end of each copy of the brief, that the brief is identical to the version submitted electronically. [7898520] (RH)
		* * *
09/20/2011	16	Filed Appellees Adam Adams and Town of Gilbert, Arizona supplemental excerpts of record on appeal in 1 volume. [7903982] (LA)
		* * *

Date Filed	#	Docket Text
10/11/2011	19	Filed clerk order: The reply brief [17] submitted by Good News Community Church and Clyde Reed is filed. Within 7 days of the filing of this order, filer is ordered to file 7 copies of the brief in paper format, with a gray cover, accompanied by certification, attached to the end of each copy of the brief, that the brief is identical to the version submitted electronically. [7922268] (GV)
10/07/2011	20	Filed Appellants Good News Community Church and Clyde Reed supplemental excerpts of record on appeal in 1 volume. [7923262] (RH)
		* * *
11/21/2011	22	Filed (ECF) Appellees Adam Adams and Town of Gilbert, Arizona Motion for miscellaneous relief [Motion to Dismiss Appeal]. Date of service: 11/21/2011. [7974241] (KSA)
12/01/2011	23	Filed (ECF) Appellants Good News Community Church and Clyde Reed response opposing motion (motion for miscellaneous relief (to be used only if no other relief applies)). Date of service:

Date Filed	#	Docket Text
		12/01/2011. [7985235] (JDT)
12/12/2011	24	Filed (ECF) Appellees Adam Adams and Town of Gilbert, Arizona reply to response Date of service: 12/12/2011. [7996544] (KSA)
02/21/2012	25	Filed clerk order (Deputy Clerk: AW):Appellees' opposed motion to dismiss this appeal for mootness is referred to the panel that will hear the merits of this appeal for whatever consideration the panel deems appropriate. See 9th Cir. Gen. Ord., Appendix A(57). Briefing is complete. [8074664] (KKW)
		* * *
08/10/2012	32	ARGUED AND SUBMITTED TO CONSUELO M. CALLAHAN, PAUL J. WATFORD and JAMES K. SINGLETON. [8283576] (RT)
02/03/2013	33	FILED OPINION (CONSUELO M. CALLAHAN, PAUL J. WATFORD and JAMES K. SINGLETON) AFFIRMED. Thus, a dismissal for mootness would allow Gilbert to continue to limit Good News' speech without further judicial review. Accordingly, the motion to dismiss is denied. Judge: CMC

Date Filed	#	Docket Text
		Authoring, Judge: PJW Dissenting, FILED AND ENTERED JUDGMENT. [8505501] (RP)
02/22/2013	34	Filed (ECF) Appellants Good News Community Church and Clyde Reed petition for rehearing en banc (from 02/08/2013 opinion). Date of service: 02/22/2013. [8522909] (JDT)
		* * *
04/05/2013	36	Filed (ECF) Appellees Adam Adams and Town of Gilbert, Arizona response to Petition for Rehearing En Banc (ECF Filing), Petition for Rehearing En Banc (ECF Filing) for rehearing by en banc only (all active, any interested senior judges), Order, Order to set response by any party to anything. Date of service: 04/05/2013. [8578310]. (KSA)
07/24/2013	37	Filed order (CONSUELO M. CALLAHAN, PAUL J. WATFORD and JAMES K. SINGLETON) The petition for rehearing en banc is DENIED. [8716835] (KKW)
		* * *
10/29/2013	39	Received notice from the

Date Filed	#	Docket Text
		Supreme Court: petition for certiorari filed on 10/21/2013. Supreme Court Number 13-502. [8835621] (RR)
07/03/2014	40	Received notice from the Supreme Court. Petition for certiorari GRANTED on 07/01/2014. The motion of Professors Ashutosh Bhagwat, et al. for leave to file a brief as amici curiae is granted. Supreme Court Number 13-502. [9155857] (RR)

Excerpts of Article 4.4, Sign Regulations, of the Town's Land Development Code (ER – 540-568)

Article 4.4: Sign Regulations

Sections:

4.401 Purposes
4.402 General Sign Regulations
4.403 Sign Criteria
4.404 Real Estate Signs and Development Signs
4.405 Residential
4.406 Nonresidential Uses in Residential Zoning Districts
4.407 Commercial
4.408 Heritage Village Center
4.409 Office/Employment
4.4010 Public Facility/Institutional
4.4011 Notice of Violation
4.4012 Removal
4.4013 Violations, A-Frame Signs

4.401 Purposes

A. The purposes of the sign regulations are: to establish comprehensive provisions that will assure proper and efficient expression through visual communications involving signs compatible with the character and environment of the Town; to eliminate confusing, distracting, and unsafe signs; and to enhance the visual environment of the Town of Gilbert. The regulation of signs within the Town of Gilbert is necessary and in the public interest for the following reasons:

1. To promote and aid the public and private sectors in the identification, location, and advertisement of goods and services.

2. To preserve the beauty and the unique character of the Town of Gilbert and to protect the Town against visual blight.

3. To protect property values within the Town of Gilbert by assuring the compatibility of surrounding land uses.

4. To promote general safety and protect the general public from damage or injury caused by, or partially attributed to, the distractions, hazards, and obstructions which result from improperly designed or located signs.

5. To promote the general welfare and to provide a pleasing environmental setting and community appearance which are vital to the continued economic development of the Town.

6. To make signs compatible with overall Town design objectives which are important in attracting new residents and business to the community.

7. To make signs readable to the user in a clear, unambiguous, and concise manner.

8. To ensure signs are clear and compatible with the planned character of the adjacent architecture and neighborhoods, and to

provide the essential identity of, and direction to facilities in the community.

9. To emphasize small town historical character by promoting pedestrian oriented and appropriately scaled signage in the Heritage Village Center zoning district.

4.402 General Sign Regulations

A. ***Requirement of Permit.*** Except as provided in Section 4.402D: Signs Not Requiring a Sign Permit, it shall be unlawful for any person to construct, install, attach, place, paint, alter, relocate, or otherwise maintain any sign in the Town without first obtaining a sign permit in accordance with this article.

B. ***Requirement of Conformity.*** Signs shall not be installed, placed, or maintained in the Town except in conformance with this Article. If provisions of this Article are in conflict with any other Town code, the more restrictive requirement(s) shall apply. Signs maintained contrary to the provisions of this article are declared to be nuisances and may be abated as provided by law.

C. ***Sign Permit Application.*** Application for a sign permit shall be made on forms provided by the Development Services Manager.

D. ***Signs Not Requiring a Sign Permit.***

1. Signs installed by governmental jurisdictions when acting in their governmental capacity.

2. One Identification Sign per building entrance 6 square feet or less in area.

3. Permanent regulatory and parking signs 6 square feet or less in area and a maximum of 6 feet in height.

4. Permanent Wall Signs of an informational nature, not including business Identification Signs, such as signs identifying service or delivery entrances, 6 square feet or less in area.

5. Real Estate Signs 6 square feet or less in area and a maximum of 6 feet in height, in compliance with Section 4.404: Real Estate Signs.

6. Residential Open House Signs.

7. Political Signs, in compliance with Section 4.402I: Political Signs.

8. Ideological Signs, in compliance with Section 4.402J: Ideological Signs.

9. Garage Sale Signs, in compliance with Section 4.402K: Garage Sale Signs.

10. Business identification banners during street construction, in compliance with Section 4.402L: Business Identification Banners during Street Construction.

11. Interim business identification banners, in compliance with Section 4.402M: Interim Business Identification Banners.

12. Boutique Signs, in compliance with Section 4.402O: Boutique Signs.

13. Window Signs.

14. A-Frame Signs, in compliance with Section 4.402N: A-Frame Signs.

15. Temporary Directional Signs Relating to a Qualifying Event, in compliance with Section 4.402P: Temporary Directional Signs Relating to a Qualifying Event.

16. Construction Signs, in compliance with Section 4.404H: Construction Signs.

17. Suspended Signs 6 square feet or less in area in commercial projects and in the Heritage Village Center zoning district.

18. Umbrella Signs in the Heritage Village Center zoning district.

19. Historic Markers 6 square feet or less in area.

20. Restaurant Menu Signs 6 square feet or less in area, not including Drive-Through Restaurant Menu Signs, displayed within 10 feet of the business entry.

21. Required street addresses.

22. Sign walkers, in compliance with section 4.402W.

23. Short-Term Display of Banners and Flags, provided that prior written notification of the sign type, size, placement and dates of proposed display is provided to the Code Compliance Administrator.

E. ***Maintenance of Legal Signs.*** Maintenance of legal signs shall not require a permit. Sign maintenance is the replacement or repair of a part or portion of a sign required by ordinary wear, tear, or damage, with like material, color, and design. Maintenance of legal signs does not include changing the color, size, design, or style of signs.

F. ***Sign Panel Replacement.*** Replacement of a panel containing the same color, size, design, and style as the original on an approved sign structure with removable panels shall not require a permit.

G. ***Flagpoles.***

1. *Location.* Flagpoles shall be depicted on Final Design Review plans.

2. *Height.* Flagpoles shall not exceed 1.5 times the allowed building height for the district in which it is located, but in no event shall a flagpole exceed a height of 50 feet.

3. A building permit shall be required for flagpoles.

4. A sign permit is not required for flags or insignias of any nation, state, county, city or other political unit.

H. ***Bus Shelter Signage.*** Notwithstanding the provisions of Section 4.402R.7, signs in conjunction with bus shelter facilities approved by the Town or other governmental agencies shall be permitted. Development standards, including but not limited to sign face area, height, location, etc., shall be determined in accordance with bus shelter design requirements established by the Town Engineer.

I. ***Political Signs.*** Political Signs up to 16 square feet are permitted on property zoned for residential use. Political Signs up to 32 square feet are permitted on property zoned for nonresidential use, undeveloped Town property, and Town rights-of-way. Political Signs shall be removed no later than 10 days following the election, unless otherwise set forth in this article. Political Signs shall not exceed 6 feet in height. Political Signs may be placed in Town rights-of-way and on Town property used as a polling place, only in compliance with the following requirements:

1. Political Signs placed in the right-of-way shall not block visibility to any roadway or property. Political Signs located within 15 feet of back of curb, or edge of pavement if there is no curb, shall be presumed to block visibility.

2. Political Signs posted on property owned by the Town of Gilbert, which is used as a polling place, shall be:

   a. Limited to a single sign not exceeding 4 square feet for each candidate or ballot question.

   b. Posted only during the early voting period or on the date of an election.

   c. Located outside the 75 foot limit.

   d. Removed from the property by 11:59 pm on the date of completion of the early voting period or the date of the election.

J. ***Ideological Signs.*** Ideological Signs are permitted in all zoning districts. Signs shall be no greater than 20 square feet in area and 6 feet in height.

K. ***Garage Sale Signs.*** Garage Sale Signs are permitted only during the hours the sale is being conducted. The signs shall not be greater than 6 square feet in area and 6 feet in height. No more than 3 Garage Sale Signs may be displayed. Signs shall only be placed on private property and shall not be placed on any sign, tree, light

pole, traffic signal or controller, utility box or other structure within the right-of-way. The person who installed the signs shall remove all signs at the end of the sale. If the person installing the signs is unknown, the property owner shall be responsible for removal.

L. ***Business Identification Banners during Street Construction.*** Banners identifying an existing business are permitted during construction by a public entity or utility on a roadway immediately fronting the business premises, subject to the following regulations:

1. *Size.* Signs shall be no greater than 8 feet in height and 18 square feet in area.

2. *Display.* Signs shall only be displayed from the start of construction to the end of construction, where access to the premises is impaired by the construction or traffic barriers are placed in the right-of-way that provide a visual distraction from ordinary business signage.

3. *Location.* Business identification banners shall be attached to poles or posts fixed to the ground or to parking or site screen fences.

4. *Prohibited Locations.* Business identification banners shall not be installed:

   a. In the public right-of-way.

b. On landscaping, vehicles, utility facilities, or any other structure.

M. ***Interim Business Identification Banners.*** Banners identifying a business are permitted from the date of application for a Certificate of Occupancy for the business until the date of installation of permanent signage, provided the applicant has a pending sign permit application for permanent signage and is diligently pursuing the manufacture and installation of such signage. Such signs shall be placed upon the building wall of the business. Interim Banners shall not exceed the sign area permitted for temporary Wall Signs for the use, and shall not be displayed for a period exceeding 120 days.

N. ***A-Frame Signs.*** A-Frame Signs shall be permitted for apartment complexes and businesses in the Commercial, Heritage Village Center, Office, Employment, and Public Facility/Institutional zoning districts, subject to the following regulations:

1. *Size.* Signs shall be no greater than 24 inches in width and 44 inches in height.

2. *Number.* Up to three A-Frame Signs shall be permitted per apartment complex or per business. Only one sign per apartment complex or business shall be permitted to be placed on any one adjacent street frontage. In no event shall the combined number of A-Frame signs and Flying Banners exceed three per apartment complex or business. For the

purposes of this section, a business is defined as one entity per building or suite of 10,000 square feet or less if located in the Commercial, Heritage Village Center, and Office Zoning Districts and up to 30,000 square feet if located in the Employment and Public Facility/Institutional Zoning Districts.

3. *Display.* Signs shall be displayed only:

   a. During the hours the business is open to conduct business; or

   b. During the hours an apartment complex rental office is open to conduct business.

4. *Location.* A-Frame Signs shall be located only:

   a. At grade level.

   b. On-site or adjacent to apartment buildings.

   c. Adjacent to the business being advertised, as follows:

      (1) For stand-alone single businesses, the signs shall be placed on the business property being advertised or in the right-of-way adjacent to the business property.

      (2) For businesses located in a commercial/office complex with multiple tenants and/or buildings, or in employment parks, the signs may be

placed within or at the perimeter of the complex or employment park, or in the abutting right-of-way.

5. *Prohibited Locations.* A-Frame Signs shall not be located:

   a. In raised or painted medians.

   b. Across any street from the business being advertised.

   c. In parking aisles or stalls.

   d. In driving lanes.

   e. On equestrian or multi-use trails.

   f. So that less than a minimum of 4 feet is clear for pedestrian passage on all sidewalks and walkways, or so as to cause a hazard to pedestrian traffic.

   g. On fences, boulders, planters, other signs, vehicles, utility facilities, or any structure.

   h. Within a minimum distance of 20 feet from any other A-Frame Sign or Flying Banner.

   i. Within a minimum distance of 30 feet from an access drive or street intersection.

6. *Right-of-Way Placement.* Signs may be placed in the right-of-way, a minimum of 2 feet from back of curb.

7. *Construction and Maintenance.* Signs shall be:

   a. Constructed with a protective, water resistant coating which is impervious to weather conditions;

   b. Constructed with cut vinyl or other weather resistant graphics and may contain zip tracks or Velcro for changing of cut vinyl graphics.

   c. Of sufficient weight and durability to withstand wind gusts, storms, etc.; and

   d. Maintained in a professional manner free from chipping paint, cracks, gouges, loss of letters, etc.

8. *Elements Prohibited on A-Frame Signs Along Street Frontages.* The following shall be prohibited on A-Frame Signs along street frontages:

   a. Any form of illumination, including flashing, blinking, or rotating lights;

   b. Animation;

   c. Reflective materials;

   d. Attachments, including, but not limited to, balloons, ribbons, speakers, etc.

O. ***Boutique Signs.*** Up to 3 off-site Temporary Signs advertising a boutique may be displayed. Boutique Signs shall not exceed 6 square feet in area and 6 feet in height. Boutique Signs shall only be displayed during the hours that the boutique is open. Boutique Signs are prohibited on public property, including rights-of-way, and shall not be placed on any other sign or fixed structure. The person who installed the Boutique Signs shall remove all signs at the end of the sale. If the person installing the signs is unknown, the property owner shall be responsible for removal.

P. ***Temporary Directional Signs Relating to a Qualifying Event.*** Temporary Directional Signs Relating to a Qualifying Event shall be permitted subject to the following regulations:

1. *Size.* Signs shall be no greater than 6 feet in height and 6 square feet in area.

2. *Number.* No more than 4 signs shall be displayed on a single property at any time.

3. *Display.* Signs shall only be displayed up to 12 hours before, during, and 1 hour after the qualifying event ends. The person who installed the signs shall be responsible for removal. If the person installing the signs is unknown, the property owner shall be responsible.

4. *Location.* Temporary Directional Signs Relating to a Qualifying Event may be located

off-site and shall be placed at grade level. Signs shall be placed only with the permission of the owner of the property on which they are placed.

5. *Prohibited Locations.* Temporary Directional Signs Relating to a Qualifying Event shall not be located:

   a. In the public right-of-way.

   b. On fences, boulders, planters, other signs, vehicles, utility facilities, or any structure.

6. *Construction.* Signs shall be:

   a. Constructed of durable and weather-resistant materials.

   b. Anchored or weighted down to avoid being displaced in windy conditions, or otherwise be a safety hazard to the public.

Q. ***Address Signs.*** Each dwelling unit shall be clearly identified by a street or unit number. Each nonresidential building or group of buildings shall be identified by a street number, visible from adjacent streets, not to exceed 6 square feet in area. Required address signage is not counted as a part of the total sign area permitted for a building or group of buildings.

R. ***Prohibited Signs.*** All signs are not expressly permitted by this Article shall be prohibited, including but not limited to:

1. Vehicle Signs and signs attached to any vehicle, except for magnetic signs and signs painted or wrapped on the surface of the vehicle. The primary use of such vehicles shall be in operation of the business and not advertising or identifying the business premises. Unless parked in a lawful parking space, the vehicle shall not be parked in the right-of-way.

2. Flashing, blinking, reflective, or animated signs, including signs with an intermittent or varying color or intensity of artificial illumination, whether deliberate or as a consequence of a defect in the sign or the illumination source, except as permitted in Section 4.408: Heritage Village Center. Changeable Message Signs and time and temperature displays are not flashing or animated signs.

3. Moving signs, including the sign body or any segment thereof.

4. Signs that by shape, color, design, and placement are likely to be confused with a road sign, or any other traffic control sign or device.

5. Signs which advertise activities illegal under Federal, State, or local laws, rules, or regulations.

6. Signs installed, attached, or painted on fences, rocks, trees, or natural features, except as

permitted in Section 4.404C: Nonresidential Real Estate Signs and Development Signs, and Section 4.404D: Construction Signs.

7. Signs installed, attached, or painted on any object within the right-of-way. Bus Shelter Signage may be permitted as provided for in Section 4.402H: Bus Shelter Signage and Section 4.408: Heritage Village Center.

8. Balloons and inflatable objects.

9. Portable Signs, except A-Frame Signs and Flying Banners.

10. Signs projecting above a roofline or mounted on a roof, except as permitted in Section 4.408: Heritage Village Center.

11. Billboards.

12. Wall-mounted Cabinet Signs and logos, unless:

    a. Such sign is approved by the Design Review Board as part of a Master Sign Plan; or by the Redevelopment Commission as part of a Heritage Sign Plan for properties located in the Heritage Village Center zoning district; or by the Director of Planning, as set forth in Section 5.602.B.l, Administrative Design Review; and

b. Such sign does not exceed the permitted total business sign area in the Heritage Village Center zoning district and Wall Sign Area in the NC, CC, SC, GC, RC, NO, GO, BP, LI, GI, and PF/I zoning districts; and

c. Such sign has a:

(1) Cabinet that is stylized in shape, rather than rectangular, to reflect the shape of the image printed on the sign face; or

(2) Molded sign face, with embossed copy or sign copy or sign copy in relief; or

(3) Nationally registered trademark or logo that is no more than 50% of the total permitted wall sign area. Larger logos may only be approved by the Design Review Board. This provision does not apply to Service Station Canopy Signs regulated in Section 4.407.C.4.

13. Signs with exposed raceways, except where it is determined by the Zoning Administrator that it is not structurally feasible to install a sign in an otherwise permitted location without using an exposed raceway.

14. Pole Signs.

15. Signs installed, attached, or painted on bicycle racks or seating benches in the Heritage Village Center zoning district.

S. ***Non-Conforming Signs.***

1. Non-conforming signs may receive reasonable repairs or alterations to the face, letters, and frame.

2. If a non-conforming sign is structurally changed or is damaged by fire, lack of maintenance, or other causes by more than 50 percent of its reproduction value, or is temporarily or permanently removed by any means, including "an act of God," then such sign shall be rebuilt, repaired, or replaced only in conformance with the provisions of this article.

3. If a non-conforming sign which no longer advertises a current use remains, with or without copy, for a period of 90 days, it shall be presumed abandoned, and shall be removed after notice to the property owner, unless the property owner establishes facts sufficient to rebut the presumption of abandonment.

4. If a property or development is expanded or modified to add new signage, all non-conforming signs shall be removed or rebuilt to comply with the provisions of this article.

5. Sign faces may be replaced on non-conforming signs.

6. Any change to a property that adds to or changes existing signage shall be prohibited until all non-conforming signs are removed or

rebuilt in conformance with of this article. Nothing herein shall prevent the replacement of sign faces on a non-conforming sign. Nothing herein shall require that existing signage which does not conform to the restrictions on cabinet signs or raceways be brought into conformance where it is demonstrated to the Zoning Administrator that the type of signage permitted by this article is not structurally feasible.

7. The purchase and placement of A-Frame Signs is not a substantial capital investment in the business being advertised. Upon repeal or modification of the regulations pertaining to A-Frame Signs that results in further restricting or prohibiting A-Frame Signs, such signs shall not be legal nonconforming signs and A-Frame Signs shall comply with all current regulations.

T. ***Abandoned Signs.*** Sign copy on abandoned signs shall be removed within 30 days of abandonment.

U. ***Special Sign Districts.*** Special sign districts established by a specific plan or by ordinance may have unique regulations applicable to such districts, which differ from those set forth in this article. Such specific regulations shall apply to all signs in the district. If the special district does not have specific regulations, the regulations of this article shall apply.

V. ***No Discrimination*** *against Non-Commercial Signs.* Any permitted sign may contain a non-commercial message.

W ***Sign Walkers.*** Sign walkers shall be permitted, subject to the following regulations:

1. *Location:* sign walkers shall be located only:

   a. 30 feet from a street or driveway intersection measured from the back of the curb or edge of pavement if no curb exists. {insert graphics}

   b. 5 feet from the street measured from the back of curb or edge of pavement if no curb exists.

   c. Sign walkers shall yield right-of-way to pedestrians, bicycles and all others traveling or located on the sidewalks.

   d. At grade level.

2. *Prohibited locations:* sign walkers shall not be located:

   a. In raised or painted medians.

   b. In parking aisles or stalls.

   c. In driving lanes or driveways.

   d. On equestrian or multi-use trails.

e. So that less than a minimum of 4 feet is clear for pedestrian passage on all sidewalks and walkways, or so as to cause a hazard to pedestrian traffic.

f. On fences, boulders, planters, other signs, vehicles, utility facilities, or any structure.

g. Within a minimum distance of 20 feet from any other sign walker.

h. In a manner that results in sign walkers physically interacting with motorists, pedestrians, or bicyclists.

3. *Display.* Signs shall be:

a. Displayed only during the hours the business is open to conduct business.

b. Held, worn or balanced at all times.

4. *Elements prohibited.* The following shall be prohibited:

a. Any form of illumination, including flashing, blinking, or rotating lights;

b. Animation on the sign itself;

c. Mirrors or other reflective materials;

d. Attachments, including, but not limited to, balloons, ribbons, speakers.

X. ***Flying Banners.*** Flying Banners shall be permitted for apartment complexes and businesses in the Commercial, Heritage Village Center, Office, Employment and Public Facility/Institutional Zoning Districts, subject to the following regulations:

1. *Size.* Signs shall be no greater than 15 feet in height.

2. *Number,* Up to three Flying Banners shall be permitted per apartment complex or per business. One sign per individual business shall be permitted to be placed on anyone adjacent street frontage. In no event shall the combined number of Flying Banners and A-Frame Signs exceed three per apartment complex or business. For the purposes of this section, a business is defined as one entity per building or suite of 10,000 square feet or less if located in the Commercial, Heritage Village Center, and Office Zoning Districts and up to 30,000 square feet if located in the Employment and Public Facility/Institutional Zoning Districts.

3. *Display.* Flying Banners shall be displayed only:

   a. During the hours the business is open to conduct business; or

   b. During the hours an apartment complex rental office is open to conduct business.

4. *Location.* Flying Banners shall be located only:

   a. With a base at grade level.

   b. On-site or adjacent to apartment buildings.

   c. At a distance from a street frontage curb that is at least equal to the height of the Flying Banner.

   d. Adjacent to the business being advertised, as follows:

      (1) For stand-alone single businesses, the flying banners shall be placed on the business property being advertised or in the right-of-way adjacent to the business property.

      (2) For businesses located in a commercial/office complex with multiple tenants and/or buildings, or in employment parks, the flying banner may be placed within or at the perimeter of the complex or employment park, or in the abutting right-of-way.

5. *Prohibited Locations.* Flying Banners shall not be located:

   a. In raised or painted medians.

b. Attached to or supported by ground stakes or tents.

c. Across any street from the business being advertised.

d. In parking aisles or stalls.

e. On equestrian or multi-use trails.

f. So that less than a minimum of 4 feet is clear for pedestrian passage on all sidewalks and walkways, or so as to cause a hazard to pedestrian traffic.

g. On fences, boulders, planters, other signs, vehicles, utility facilities, or any structure.

h. Within a minimum distance of 20 feet from any other Flying Banner or A-Frame sign.

i. Within a minimum distance of 30 feet from an access drive or street intersection.

6. *Construction and Maintenance.* Flying Banner signs shall be:

a. Supported by a base of a sufficient weight and durability to withstand wind gusts, storms, etc.; and

b. Maintained in a professional manner free from fading, tearing, etc.

4.403 Sign Criteria

A. ***Design of Permanent Signs.*** All permanent signs shall be compatible with the design of buildings and sites, reflecting the architectural style, building materials, textures, colors, and landscape elements of the project.

B. ***Permanent Sign Construction.*** Permanent signs shall be constructed of durable materials. In no case shall any permanent sign be secured with wires or strips of wood which are visible and not an integral part of the sign. Nonstructural trim may be of wood, metal, approved plastic or any combination thereof.

C. ***Placement of Signs.***

1. Permanent signs shall not project into or over the public right-of-way without first obtaining a license from the Town.

2. Signs or support structures shall not be located in such a manner that obstructs any door, fire escape, stairway, or any opening, exit, walkway, utility access or Fire Department connection.

3. The lowest portion of any sign which extends over an area intended for pedestrian use shall not be less than 8 feet above finished grade. The lowest portion of any sign which extends over an area intended for vehicular use shall not be less than 14 feet above the finished grade.

4. Unless otherwise specifically authorized by the article, no sign shall be placed on any property without written consent of the owner or owner's authorized agent.

5. Notwithstanding other provisions of this article, no sign shall create a hazard to the safe movement of traffic by obstructing the vision of motorists, as determined by the Traffic Engineer.

6. Projecting Signs for commercial uses shall be approved by the Design Review Board through either a Comprehensive Sign Program or Master Sign Plan and may only be located on the ground floor and second floor of the building.

* * *

4.405 Residential

The following regulations shall apply to all single family and multi-family residential zoning districts.

* * *

B. ***Temporary Signs***

* * *

2. *Weekend Directional Signs.* Weekend Directional Signs shall comply with the following regulations:

a. Applicability. Weekend Directional Signs shall only be approved for new construction in a residential subdivision within the Town.

b. Term. A sign permit for Weekend Directional Signs is valid for 1 year from the date of issuance or until the model home complex is permanently closed, whichever occurs first. The sign permit may be renewed annually.

c. Quantity. A total of 15 Weekend Directional Signs may be permitted for each recorded subdivision plat.

d. Size. Signs shall be no greater than 4 feet in height and 3 square feet in area.

e. Location. Weekend Directional Signs shall be located within a 2 mile radius of the subdivision perimeter.

f. Installation and Removal. Weekend Directional Signs shall be installed no earlier than 6:00 p.m. on Friday of each week and shall be removed no later than 8:00 a.m. on the following Monday. Signs shall be installed no earlier than 6:00 p.m. preceding any official U.S. holiday and shall be removed by 8:00 a.m. the day following the holiday, or Monday if the holiday occurs on Friday.

g. Spacing. Individual signs shall be located a minimum of 40 feet from any other Weekend Direction Sign, regardless of the builder. No more than 5 Weekend Directional Signs shall be located within any 500 foot length on the same side of a street, regardless of the builder.

h. Material. Signs shall be constructed of heavy duty, weather-resistant material, such as laminated paper, plastic foam core, or similar material. Placement stakes shall be wood or heavy gauge wire.

i. Label. The back of each individual sign shall contain in clear, legible form the current sign permit number, the builder's name, and the sign company's name and phone number in letters at least 1 inch in height.

j. Prohibited Locations. Weekend Directional Signs shall not be placed:

(1) In the center median of any street; or

(2) Within 10 feet of the pavement edge of any street where no curb exists; or

(3) Within 2 feet of the face of curb where a curb exists; or

(4) On or closer than 3 feet from any vehicle, fire hydrant, light or traffic

signal pole, traffic sign, bench, bus stop, tree, utility box, or any similar feature.

(5) On any property without written permission of the owner or person in control of the property.

4.406 Nonresidential Uses in Residential Zoning Districts

* * *

C. **Temporary Signs.** Temporary Signs shall comply with the following regulations:

* * *

4. *Homeowners Association Facilities Temporary Signs.* Temporary Signs for *Homeowners Association Facilities* shall comply with the following regulations:

a. Applicability. Banners and Directional Signs for *Homeowners Association Facilities* are permitted that display information concerning seasonal or temporary events occurring in the development.

b. Sign Area and Location. A maximum of 80 square feet of sign area is permitted within the limits of the residential community.

c. Installation and Removal. Signs shall be installed no earlier than 30 days prior to

the date of an event and shall be removed within 48 hours of completion of the event.

d. Materials. Signs shall be constructed of lightweight, weather-resistant material.

e. Placement. The regulations of Section 4.402: General Sign Regulations and Section 4.403.C: Placement of Signs shall apply.

Excerpts of the Glossary of General Terms to the Town's Land Development Code

Terms

* * *

use building with ground floor commercial space.

Secondary Dwelling Unit. A second, subordinate dwelling unit located on the same lot as the principal dwelling unit.

Single Family Dwelling Unit. 1building on 1 lot or parcel designed for occupancy by I family for living and sleeping purposes, and having cooking and sanitary facilities.

Studio Dwelling Unit. A unit containing only a single habitable room for living and sleeping purposes, and having cooking and sanitary facilities.

Retail Sales. The sale, rental, or lease of goods, products, or material directly to the consumer.

Right-of-Way. A strip of publicly owned land occupied by or planned for a street, utilities, landscaping, sidewalks, trails, and similar facilities.

Rodent. *(See Gilbert Municipal Code Chapter 6, Article III Livestock and Nondomestic Animals, Section 6-126:* Definitions)

Roof Line. The eave line on any part of a building with a pitched roof, or the upper edge of the parapet wall or vertical architectural wall feature on any part of a building with a flat roof.

Setback. The minimum distance by which any building or structure is required to be separated from a property line. *{insert graphics}*

Setback, Front. A line within the lot or parcel parallel to a straight front property line. Where the front property line is not straight, the front setback line is a line within the lot or parcel separated from the front property line at all points by a distance equal to the front setback set forth in the base zoning district regulations.

Setback, Rear. A line opposite the front property line extending across the full width of a lot or parcel, the depth of which is the shortest horizontal distance between the rear property line or, if none exists, the assumed rear property line and a line parallel thereto.

Setback, Side. A line extending from the front setback line to the rear setback line, the depth of which is the horizontal distance set forth in the base zoning district regulations. The side setback extends from the front setback line, or the front property line of a lot or parcel where no front setback is required, to the rear setback line, or the rear property line of the site where no rear setback is required.

Setback Area. The area of a lot or parcel outside of the building envelope. {insert graphic}

Setback Area, Front. The area bounded by the front property line or lines, the side property lines, and the front setback line.

Setback Area, Rear. The area bounded by the rear property line or lines, the side property lines and the rear setback line.

Setback Area, Side. The area bounded by a side property line, a side setback line, and the front and rear setback lines.

Sign. A communication device, structure, or fixture that incorporates graphics, symbols, written copy, and/or lighting intended to promote the sale of a product, commodity, or service, or to provide direction or identification for a business or a facility. Signs shall not include any flag, badge, or insignia of any governmental unit, nor shall it include any item of merchandise normally displayed in a business window.

Murals, statuary, architectural features such as trademarked building forms, decorative canopies or awnings, and corporate color accents shall be considered signage where they are integral to the conveyance of a commercial message, except where determined by the Design Review Board to be architectural, rather than communicative, in nature.

Sign Related Terms.

Abandoned. A sign located on a lot or parcel which no longer identifies or advertises a business, lessor, service, owner, product, or activity on the premises where the sign is displayed.

Animation.

1. The movement of any illumination or the flashing or varying of light intensity of any light used in conjunction with a sign such as blinking, traveling, flashing or changing degree of intensity of any light movement other than burning continuously; or

2. The movement or the optical illusion of movement of any part of the sign structure, design or pictorial segment, the automatic changing of all or any part of the facing of a sign; or

3. The movement of a sign set in motion by the atmosphere. Signs displaying only time and temperature, banners and flags are not considered animated signs.

Architectural Detail / Feature / Element. Prominent or significant parts or elements of a building or structure including but not limited to; cornices, belt courses, lintels, sills, pediments, columns or pilasters, rustications, or base courses.

Balloon. Any lighter than air, cold air, or gas filled inflatable object attached by a tether to a fixed place or mounted on the ground or a building.

Builder's Sign Package. A group of on- and off-site signs approved for use by a residential home builder for marketing new construction in a subdivision.

Commercial Center. A group or cluster of retail shops, offices, or employment buildings which share common parking, landscaping, and/or frontage, and may have a property owners association and have a name which is generally understood by the public to refer to the group or cluster.

Commercial Building, Multiple Tenant. A commercial building with 2 or more separate tenants having individual entrances and shared parking.

Comprehensive Sign Program. A set of sign design standards established for a multitenant building, non-residential complexes with multiple buildings, or large-scale mixed-use developments.

Height, Sign. The vertical distance measured from the adjacent ground level, or upper surface of the nearest sidewalk, whichever is greater, to the highest point of the sign face; excluding freestanding signs in the Heritage Village Center zoning district whereas the height measurement includes: structural supports; monument base

architectural features of a monument sign structure; nonstructural or decorative trim.

Indirect Illumination. An external source of illumination that is not part of or attached to a sign.

Individual Letters. A cutout or etched letter or logo which is individually placed on a wall or freestanding sign.

Internal Illumination. A light source entirely within a sign where the source of the illumination is not directly visible.

Internal Indirect Lighting (Halo Lighting). A source of illumination, not directly visible, lighting only the background upon which the individual letter is mounted.

Logo. A graphic symbol representing an activity, use, or business. Logos are registered trademarks or symbols commonly used by a business and may include lettering in addition to graphic designs.

Master Sign Plan. A comprehensive sign plan for large scale multiple tenant commercial or employment uses, building complexes for a single commercial or employment use, auto malls, hospitals, or enclosed regional retail malls.

Pan-Channel Letter. An individual three-dimensional letter constructed by means of a three-sided metal channel.

Raceway. A structure used for wall-mounted signage with individual letters or characters, located upon the exterior wall surface between the wall and the letters or sign characters. Raceways contain wiring, conduit, transformers, and other electrical components.

Sign Area. The area of the smallest rectangle, or combination of rectangles, which comprises the sign face or encompasses the sign copy. The area of a sign is the entire face of the sign and includes any art work and insignia within a single continuous perimeter, including any spacing between letters, figures, designs, and structure of the sign other than the sign base, together with any frame or other material, color, or condition which forms an integral part of the display and is used to differentiate such sign from the wall or background against which it is placed. For a freestanding sign, the definition of sign area does not include the perimeter architectural embellishments, base structure, and details such as decorative columns and caps. When the sign only consists of letters, designs, or figures engraved, painted, projected, or fixed on a building or perimeter wall, the total area of the sign shall be the area of the smallest rectangle, or combination of rectangles, within which the entire fixed lettering and/or artwork is inscribed. All sides of a sign visible from any 1 location shall be measured in determining the area of the sign, except that only 1 side of a sign shall be measured if the 2 sides are back-to-back or separated by an interior angle of 45 degrees or less. If the two 2 sides are not of equal size, the

larger side shall be measured. A back-to-back sign has parallel faces separated by not more than 2 feet.

Sign Area, Pennant. The sum of the area of the rectangles surrounding each piece of material strung on a pennant.

Sign Area, Total. The aggregate area of all signs for any individual use.

Sign Face. The surface upon, against or through which the sign copy and/or graphic is displayed or illustrated, not including: structural supports; monument base; architectural features of a building or monument sign structure; nonstructural or decorative trim. When a sign only consists of letters, designs, or figures engraved, painted, projected, or fixed on a building or perimeter wall or other structure, and does not include a background contrasting with the material or color of the building or perimeter wall or other structure, the sign face shall consist of the entire fixed lettering and/or artwork, together with the spacing between the letters, figures or designs.

Sign Plan. A drawing required to be submitted with an application for a sign permit. The plan may show 1 or more signs.

Sign Structure. The supports, uprights, braces and framework of a sign.

Sign Types

A-Frame Sign. A portable, stand alone sign comprised of two separate panels or faces joined at the top and spread apart at the bottom to form a base upon which the sign stands.

Awning Sign. A sign painted, installed, attached or otherwise applied to or located directly on an awning.

Banner. A temporary sign of fabric, plastic, paper or other light pliable material not enclosed in a rigid frame.

Billboard. A sign or structure, other than a temporary sign, portraying information or directing attention to a business, activity, commodity service, entertainment, or communication which is not conducted, sold or offered at the parcel on which the sign or structure is located or which does not pertain to the parcel upon which the sign or structure is located.

Boutique Sign. A temporary sign advertising the location of a boutique sale.

Builder/Real Estate Sign. A sign that provides information about the builder, name of the development, and marketing information for the project on which the sign is located.

Building Identification Sign. A sign identifying the name of the multi-tenant building to which the sign is attached.

Cabinet (Can) Sign. A three-dimensional enclosed structure which includes all text, logos, and symbols with a single or double sign face(s).

Changeable Message Sign. A sign designed to permit change of copy manually, mechanically or electronically, including such signs where the change of copy is by remote or automatic means.

Construction Sign. A temporary sign erected on a parcel on which construction is taking place, identifying the architects, engineers, landscape architects, contractors, subcontractors, and the owners, lenders, sponsors, and similar individuals or firms involved in the project.

Development Sign. A temporary sign providing information about future development of real property or current construction at a development site.

Directional Sign. A sign directing traffic to an activity or use.

Directory Sign. A sign showing the locations of tenants in a multi-tenant commercial, office, or employment complex, or tenants in a multi-family residential project.

Drive-Through Restaurant Menu Sign. A sign listing items for sale at a drive-through

restaurant window, with or without ordering capability.

Flag. A fabric sheet of square, rectangular or triangular shape which is mounted on a pole, cable or rope at 1 end.

Flying Banner. A portable, stand alone sign comprised of light fabric that moves with the wind and can turn 360° and is supported by a pole structure and a base.

Freestanding Sign. A sign erected or mounted on its own self-supporting structure or base detached from any supporting elements of a building, wall or fence.

Freeway Sign. A freestanding sign intended to advertise or identify uses to motorists on a freeway.

Garage Sale Sign. A temporary off-site sign advertising the occasional sale of goods from a residential use.

Grand Opening Sign. A temporary sign announcing a new business.

Identification Sign. A permanent sign identifying name, type of business, and/or hours of operation, attached to or painted on a window, door, or a building area next to the main entrance.

Ideological Sign. Ideological Sign means a sign communicating a message or ideas for non-

commercial purposes that is not a *Construction Sign, Directional Sign, Temporary Directional Sign Relating to a Qualifying Event, Political Sign, Garage Sale Sign,* or a sign owned or required by a governmental agency.

Marquee Sign. A sign painted, installed, attached or otherwise applied to or located directly on a *Marquee.*

Menu Sign. A sign used to inform the public of items available in a restaurant, not located in a drive-through restaurant window lane.

Mural. An artistic rendering on a building which does not promote a particular business, service or product.

Off-Site Signage. Any sign which advertises a use, product, service, or activity occurring on a lot or parcel other than where the sign is located.

On-Site Signage. Any sign which advertises a use, product, service, or activity occurring on a lot or parcel where the sign is located.

Open House Sign. A sign that identifies a residential property for sale or lease which is open and available for inspection.

Painted Wall Sign. A sign painted directly onto the exterior wall of a building.

Pennant. Any pieces of lightweight plastic, fabric or other material, whether or not containing a

message of any kind, suspended from a rope, wire, or string, displayed in series and capable of movement in the wind.

Permanent Sign. A sign constructed of durable materials, attached to the ground or a building in a manner provided by the building code.

Pole Sign. A permanent freestanding sign supported by a single column, upright, pole, or post.

Political Sign. A temporary sign which supports candidates for office or urges action on any other matter on the ballot of primary, general and special elections relating to any national, state or local election.

Portable Sign. A temporary sign that is not permanently affixed to a building, structure, or the ground, including such commercial signs carried by people or otherwise set in motion and visible from the right-of-way.

Projecting Roof Sign. A sign mounted to and projecting from the wall of a building or structure whose depth is greater than its width; and exceeding the height of a roofline or parapet of the building or structure to which it is attached. *Projecting Roof Sign* does not include a *Marquee Sign.*

Projecting Sign. A sign mounted to and projecting from the wall of a building or structure whose depth is greater than its width.

Projecting Sign does not include a *Marquee Sign* or *Projecting Roof Sign.*

Pump-Topper Sign or Spanner. A sign affixed to the top or side of an operable, fuel dispensing pump.

Real Estate Sign. A temporary sign advertising the sale, transfer, lease, or exchange of real property.

Residential Builder Attention Flags. Temporary flags displaying a residential builder business logo or name.

Residential Entry Sign. A sign placed at the entrance to a residential development identifying the name of the development.

Roof Sign. A sign erected on a roof, or projecting above the highest point of the roof line, parapet, or fascia of a building.

Special Event Sign. A temporary sign pertaining to any special event as set forth in Chapter 15: Special Events of the Gilbert Municipal Code.

Subdivision Directional Sign. A temporary off-site sign directing motorists to a developing subdivision.

Suspended Sign. A sign suspended from a roof overhang of a covered porch or walkway, which identifies the tenant of the adjoining space.

Temporary Directional Signs Relating to a Qualifying Event. Temporary Directional Signs Relating to a Qualifying Event means a *Temporary Sign* intended to direct pedestrians, motorists, and other passersby to a "qualifying event." A "qualifying event" is any assembly, gathering, activity, or meeting sponsored, arranged, or promoted by a religious, charitable, community service, educational, or other similar non-profit organization.

Temporary Sign. A sign not permanently attached to the ground, a wall or a building, and not designed or intended for permanent display.

Time and Temperature Display. A sign or portion of a sign displaying the time and temperature.

Tower Sign. A freestanding sign greater than 8 feet and not more than 15 feet in height.

Umbrella Sign. A sign painted, installed, attached or otherwise applied to or located directly on an umbrella, including name brands and symbols.

Vehicle Sign. A sign mounted, painted or otherwise placed on a trailer or motor vehicle parked, placed, or driven so that the sign thereon is visible from a public street or right-of-way primarily for the purpose of displaying advertising signage.

V-Shaped Sign. Signs erected upon common or separate structures which present a v-shape

appearance and having an exterior angle between faces of not more than 45 degrees with distance between faces of such signs at their closest point not exceeding 2 feet.

Wall Sign. A sign permanently fastened to or painted on the wall or parapet of a building or structure in such a manner that the wall or vertical surface of the structure is the supporting structure.

Window Sign. A sign applied or attached to a window, or displayed within 6 feet of the interior of a first floor window area so as to attract attention of persons outside the building. *Window Signs* do not include merchandise in a window display.

Windscreen Sign. (see Banner).

Site. One or more contiguous lots or parcels under single ownership or unified control.

Site Plan. A plan prepared to scale showing the boundaries of a site and the proposed location of all buildings and structures, circulation, landscaping, improvements and open space areas.

Stacking Space. The area occupied by a vehicle while waiting to be served at the initial order point, fuel pump island, or service bay. Each stacking space is 20 feet in length and does not include the space of the vehicle at the initial order point.

Storage, Outdoor. Storage of material, goods, vehicles, or equipment outside of a building not for immediate use, sale or display.

Story. That portion of a building included between the upper surface of a floor and the upper surface of the floor or roof next above.

Street. A public or private thoroughfare for vehicular use providing access to public or private property and other streets, including dedicated roadway easements. A public street includes the associated right-of-way. A private street includes any associated roadway or access easement.

Street Types

Alley. A public or private way providing vehicular access to the rear or side of abutting properties.

Arterial, Major. A major surface street designated in the General Plan to carry the highest volumes of traffic across the Town, often connecting to freeways, and providing access to major commercial and employment areas.

Arterial, Minor. A major surface street designated in the General Plan to carry large volumes of traffic across the Town, not generally connecting to freeways, and providing access to commercial and employment areas.

Collector Street. A street that serves as a connection between local and arterial....

Ordinance No. 2112 – Amendments to Sections 4.402(D) and (P) and Glossary of General Terms of the Land Development Code, dated January 8, 2008

ORDINANCE NO. 2112

AN ORDINANCE OF THE COMMON COUNCIL OF THE TOWN OF GILBERT, ARIZONA, AMENDING THE LAND DEVELOPMENT CODE OF GILBERT, ARIZONA, DIVISION 4 GENERAL REGULATIONS, ARTICLE 4.4 SIGN REGULATIONS, BY AMENDING SECTION 4.402 GENERAL SIGN REGULATIONS, PARAGRAPH D SIGNS NOT REQUIRING A PERMIT, SUBPARAGRAPH 15 RELATED TO RELIGIOUS ASSEMBLY TEMPORARY DIRECTION SIGNS; AMENDING SECTION 4.402 GENERAL SIGN REGULATIONS, PARAGRAPH P RELIGIOUS ASSEMBLY TEMPORARY DIRECTIONAL SIGNS, SUBPARAGRAPHS 1 THROUGH 5 RELATED TO REGULATION OF RELIGIOUS ASSEMBLY TEMPORARY DIRECTIONAL SIGNS; AMENDING THE GLOSSARY OF GENERAL TERMS RELATING TO SIGN TYPES; PROVIDING FOR REPEAL OF CONFLICTING ORDINANCES; PROVIDING FOR SEVERABILITY; AND DECLARING AN EMERGENCY

WHEREAS, the Town of Gilbert is committed to establishing comprehensive sign regulations necessary and in the public interest;

WHEREAS, the Town of Gilbert is committed to promoting effective means of communications, consistent with Federal and State constitutional guarantees;

WHEREAS, the Town of Gilbert is committed to promoting public order by allowing charitable, religious, educational, community service, and other organizations to provide announcement of and directions to assemblies, gatherings, activities, or meetings sponsored, arranged or promoted by such groups;

WHEREAS, the Town of Gilbert is committed to promoting vehicular and pedestrian safety; and

WHEREAS, the Town of Gilbert is committed to promoting the general welfare and enhancing the Town's community aesthetics;

NOW THEREFORE, BE IT ORDAINED by the Common Council of the Town of Gilbert, Arizona, as follows:

Section I. In General.

The Town of Gilbert Land Development Code of Gilbert, Arizona, Division 4 General Regulations, Article 4.4 Sign Regulations, Section 4.402 General Sign Regulations, Paragraph D Signs Not Requiring a Sign Permit, Subparagraph 15 is hereby amended

to read as follows (additions in ALL CAPS; deletions in ~~strikeout~~):

4.402 General Sign Regulations

* * *

D. ***Signs Not Requiring a Sign Permit***

***

15. ~~Religious Assembly~~ Temporary DirectionAL Signs RELATING TO A QUALIFYING EVENT, in compliance with Section 4.402P: ~~Religious Assembly~~ Temporary DirectionAL Signs RELATING TO A QUALIFYING EVENT.

* * *

The Town of Gilbert Land Development Code of Gilbert, Arizona, Division 4 General Regulations, Article 4.4 Sign Regulations, Section 4.402 General Sign Regulations, Paragraph P Religious Assembly Temporary Directional Signs is hereby amended to read as follows (additions in ALL CAPS; deletions in ~~strikeout~~):

* * *

P. ***~~Religious Assembly~~ Temporary Directional Signs RELATING TO A QUALIFYING EVENT.*** Temporary Directional ~~S~~signs ~~for Religious Assembly uses~~ RELATING TO A QUALIFYING EVENT shall be permitted subject to the following regulations:

1. *Size.* Signs shall be no greater than ~~3~~ 6 feet in height and 6 square feet in area.

2. *Number.* No more than 4 signs shall be displayed on ~~one~~ A SINGLE property at any one time.

3. *Display.* Signs shall only be displayed up to ~~2~~ 12 hours before, DURING, and 1 hour after the ~~religious service~~ QUALIFYING EVENT ENDS. THE PERSON WHO INSTALLED THE SIGNS SHALL BE RESPONSIBLE FOR REMOVAL. IF THE PERSON INSTALLING THE SIGNS IS UNKNOWN, THE PROPERTY OWNER SHALL BE RESPONSIBLE.

4. *Location.* ~~*Religious Assembly t*~~*T*emporary Directional Signs RELATING TO A QUALIFYING EVENT may be located off-site and shall be placed at grade level. Signs shall be placed only with the permission of the owner of the property on which they are placed.

5. *Prohibited Locations.* ~~Religious Assembly~~ Temporary Directional Signs RELATING TO A QUALIFYING EVENT shall not be located:

   a. In the public right-of-way.

   b. On fences, boulders, planters, other signs, vehicles, utility facilities, or any structure.

* * *

The Town of Gilbert Land Development Code of Gilbert, Arizona, Glossary of General Terms, is hereby amended to read as follows (additions in ALL CAPS; deletions in ~~strikeout~~):

Glossary of General Terms

* * *

Sign Types

***

Ideological Sign. IDEOLOGICAL SIGN MEANS ~~AA~~ sign communicating a message or ideas for non-commercial purposes that is not a construction sign, directional sign, TEMPORARY DIRECTIONAL SIGN RELATING TO A QUALIFYING EVENT, political sign, garage sale sign, or a sign owned or required by a governmental agency.

***

TEMPORARY DIRECTIONAL SIGNS RELATING TO A QUALIFYING EVENT. TEMPORARY DIRECTIONAL SIGNS RELATING TO A QUALIFYING EVENT MEANS A TEMPORARY SIGN INTENDED TO DIRECT PEDESTRIANS, MOTORISTS, AND OTHER PASSERSBY TO A "QUALIFYING EVENT." A "QUALIFYING EVENT" IS ANY ASSEMBLY, GATHERING, ACTIVITY, OR MEETING SPONSORED, ARRANGED, OR

PROMOTED BY A RELIGIOUS, CHARITABLE, COMMUNITY SERVICE, EDUCATIONAL, OR OTHER SIMILAR NON-PROFIT ORGANIZATION.

* * *

Section II. Providing for Repeal of Conflicting Ordinances.

All ordinances and parts of ordinances in conflict with the provisions of this Ordinance or any part of the Code adopted herein by reference are hereby repealed.

Section III. Providing for Severability.

If any section, subsection, sentence, clause, phrase or portion of this Ordinance or any part of the Code adopted herein by reference, is for any reason held to be invalid or unconstitutional by the decision of any court of competent jurisdiction, such decision shall not affect the validity of the remaining portions thereof.

Section IV. Declaring an Emergency.

The immediate operation of the provisions of this Ordinance is necessary for the preservation of the public peace, health and safety of the Town of Gilbert, and an emergency is hereby declared to exist. This Ordinance shall be in full force and effect from and after its passage, adoption and approval by the Common Council of the Town of Gilbert.

PASSED AND ADOPTED by the Common Council of the Town of Gilbert, Arizona, this 8th day of January 2008, by the following vote:

AYES: Abbott, Berman, Presmyk, Skousen, Urie

NAYES: None ABSENT: Crozier, Krueger

EXCUSED: None ABSTAINED: None

APPROVED this 8th day of January 2008.

s/Steve M. Berman
Steven M. Berman, Mayor

ATTEST:
s/Catherine A. Templeton
Catherine A. Templeton, Town Clerk

APPROVED AS TO FORM:

s/Susan D. Goodwin
Curtis, Goodwin, Sullivan, Udall & Schwab, P.L.C.
Town Attorneys
By Susan D. Goodwin

I, CATHERINE A. TEMPLETON, TOWN CLERK, DO HEREBY CERTIFY THAT A TRUE AND CORRECT COPY OF THE ORDINANCE NO. 2112 ADOPTED BY THE COMMON COUNCIL OF THE TOWN OF GILBERT ON THE 8th DAY OF JANUARY 2008.

s/Catherine A. Templeton
Catherine A. Templeton, Town Clerk

* * *

2011 Sign Code
Zoning Code Text Amendments
October 6, 2011

The following Sections of the Town of Gilbert Land Development Code are amended to read as follows (additions in ALL CAPS; deletions in ~~strikeout~~):

Chapter I Zoning Regulations, Division 4 General Regulation, Article 4.4 Sign Regulations, Sections 4.401 Purposes, 4.402 General Sign Regulations, 4.403 Sign Criteria, 4.405 Residential, 4.406 Nonresidential Uses in Residential Zoning Districts, 4.407 Commercial, 4.408 Heritage Village Center, 4.409 Office/Employment, 4.4010 Public Facility/Institutional and the Glossary of General Terms:

4.401 Purposes

A. The purposes of the sign regulations are: ~~to establish comprehensive provisions that will assure proper and efficient expression through visual communications involving signs compatible with the character and environment of the Town; to eliminate confusing, distracting, and unsafe signs; and to enhance the visual environment of the Town of Gilbert.~~ TO PROMOTE OPTIMUM CONDITIONS FOR SERVING SIGN OWNERS' NEEDS AND RESPECTING THEIR RIGHTS TO IDENTIFICATION WHILE BALANCING THE AESTHETIC INTERESTS OF THE

COMMUNITY. The regulation of signs within the Town of Gilbert is necessary and in the public interest for the following reasons:

1. To promote and aid the public and private sectors in the identification, location, and advertisement of goods and services.

2. To ~~preserve~~ENHANCE the beauty, ~~and the~~unique character, AND QUALITY of the Town of Gilbert, ~~and to protect the Town against visual blight~~ —WHICH WILL ATTRACT COMMERCE, BUSINESSES, RESIDENTS AND VISITORS.

3. To ~~protect property values within the Town of Gilbert by assuring the compatibility of surrounding land uses~~ —PROMOTE ECONOMIC DEVELOPMENT AND THE VALUE OF COMMERCIAL PROPERTIES, BE SENSITIVE TO SURROUNDING LAND USES AND MAINTAIN AN ATTRACTIVE COMMUNITY APPEARANCE.

4. To promote general safety ~~and protect the general public from damage or injury caused by, or partially attributed to, the distractions, hazards, and obstructions which result from improperly~~ —BY ENSURING PROPERLY designed and ~~or~~-located signs.

5. ~~To promote the general welfare and to provide a pleasing environmental setting and community appearance which are vital to the continued economic development of the~~

~~Town~~TO ENCOURAGE SIGNS THAT ARE CLEAR AND LEGIBLE TO THE USER.

6. To emphasize small town historical character by promoting pedestrian oriented and appropriately scaled signage in the Heritage Village Center zoning district.

~~7. To make signs compatible with overall Town design objectives which are important in attracting new residents and business to the community.~~

~~8. To make signs readable to the user in a clear, unambiguous, and concise manner.~~

4.402 General Sign Regulations

* * *

D. ***Signs Not Requiring a Sign Permit.***

* * *

10. Business identification banners during street construction, in compliance with ~~Section~~ TABLE 4.402: ~~Business Identification Banners during Street Construction~~ TEMPORARY BANNER REGULATIONS.

11. Interim business identification banners, in compliance with ~~Section~~ TABLE 4.402: ~~Interim Business Identification Banners~~ TEMPORARY BANNER REGULATIONS.

12. ~~Boutique~~ BAZAAR Signs, in compliance with Section 4.402O: ~~Boutique~~ BAZAAR Signs.

* * *

16. TEMPORARY USES AND SPECIAL EVENTS SIGNS, IN COMPLIANCE WITH SECTION 4.402Y: TEMPORARY USES AND SPECIAL EVENTS SIGNS.

* * *

22. Required street addresses OR ADDRESS DIRECTORY SIGNS.

* * *

F. ***TENANT Sign Panel AND WALL SIGN BAND Replacement.*** Replacement of a panel containing the same color, size, design, and style as the original on an approved sign structure with removable panels shall not require a permit.

1. *MONUMENT SIGN TENANT SIGN PANEL REPLACEMENT.* INDIVIDUAL TENANT PANELS THAT ARE VACANT OR MISSING SHALL BE REPLACED WITHIN 15 DAYS.

2. *WALL SIGN FASCIA REPAIR.* WHERE A TENANT HAS VACATED A TENANT OR USER SUITE, THE FASCIA OF THE WALL SIGN BAND SHALL BE REPAIRED TO ITS SURROUNDING TEXTURE AND COLOR WITHIN 45 DAYS OF THE BUSINESS SIGN BEING REMOVED.

* * *

I. ***Political Signs.*** Political Signs up to 16 square feet IN AREA are permitted on property zoned for residential use. Political Signs up to 32 square feet IN AREA are permitted on property zoned for nonresidential use, undeveloped Town property, and Town rights-of-way. POLITICAL SIGNS PLACED WITHIN THE RIGHT-OF-WAY SHALL CONTAIN THE NAME AND TELEPHONE NUMBER OF THE CANDIDATE OR CAMPAIGN COMMITTEE CONTACT PERSON. Political Signs MAY BE PLACED IN TOWN RIGHTS-OF-WAY AND ON TOWN PROPERTY NO MORE THAN 60 DAYS BEFORE A PRIMARY ELECTION AND shall be removed no later than ~~10~~ 15 days following the GENERAL election, EXCEPT THAT FOR A SIGN FOR A CANDIDATE IN A PRIMARY ELECTION WHO DOES NOT ADVANCE TO THE GENERAL ELECTION, THE PERIOD ENDS FIFTEEN DAYS AFTER THE PRIMARY ELECTION OR unless otherwise set forth in this article. Political Signs shall not exceed 6 feet in height. Political Signs may be placed in Town rights-of-way and on Town property used as a polling place, only in compliance with the following requirements:

1. Political Signs placed in the right-of-way shall not:

   a. ~~Block visibility~~OBSTRUCT CLEAR VISION to any roadway or property. A Political Signs located within 15 feet of

back of curb, or edge of pavement if there is no curb, shall be presumed to ~~block visibility~~OBSTRUCT CLEAR VISION.

b. INTERFERE WITH THE REQUIREMENTS OF THE AMERICANS WITH DISABILITIES ACT, 42 USC §§ 12101 THROUGH 12213 AND 47 USC §§ 225 AND 611.

2. Political Signs posted on property owned by the Town of Gilbert, which is used as a polling place, shall be:

   a. Limited to a single sign not exceeding 4 square feet for each candidate or ballot question.

   b. Posted only during the early voting period or on the date of an election.

   c. Located outside the 75 foot limit.

   d. Removed from the property by 11:59 pm on the date of completion of the early voting period or the date of the election.

3. A POLITICAL SIGN PLACED IN THE RIGHT-OF-WAY THAT OBSTRUCTS CLEAR VISION OR INTERFERES WITH THE REQUIREMENTS OF THE AMERICANS WITH DISABILITIES ACT OR OTHERWISE PRESENTS A DANGEROUS SITUATION AT THE DISCRETION OF THE CODE COMPLIANCE ADMINISTRATOR SHALL

BE DEEMED TO CONSTITUTE AN EMERGENCY AND, PURSUANT TO A.R.S. SECTION 16-1019, MAY BE IMMEDIATELY RELOCATED OR REMOVED BY A TOWN PEACE OFFICER OR CODE COMPLIANCE INSPECTOR. IF A SIGN IS RELOCATED OR REMOVED UNDER THESE CIRCUMSTANCES, THE CANDIDATE OR CAMPAIGN COMMITTEE THAT PLACED THE SIGN SHALL BE NOTIFIED WITHIN 24 HOURS AFTER THE REMOVAL OR RELOCATION.

4. IF A POLITICAL SIGN IS PLACED IN VIOLATION OF THESE REQUIREMENTS BUT DOES NOT CONSTITUTE AN EMERGENCY, THE TOWN MAY NOTIFY THE CANDIDATE OR CAMPAIGN COMMITTEE THAT PLACED THE SIGN OF THE VIOLATION AND REQUIRE THE SIGN TO BE RELOCATED. IF THE SIGN IS NOT RELOCATED AND REMAINS IN VIOLATION FOR MORE THAN 24 HOURS AFTER THE CANDIDATE OR CAMPAIGN COMMITTEE WAS NOTIFIED, THE TOWN MAY REMOVE THE SIGN. THE TOWN SHALL CONTACT THE CANDIDATE OR CAMPAIGN COMMITTEE AND SHALL RETAIN THE REMOVED SIGNS FOR AT LEAST 10 BUSINESS DAYS TO ALLOW THE CANDIDATE OR CAMPAIGN COMMITTEE TO RETRIEVE THE SIGN WITHOUT PENALTY.

* * *

L. ***Business Identification Banners during Street Construction.*** Banners identifying an existing business are permitted during construction by a public entity or utility on a roadway immediately fronting the business premises, subject to the ~~following~~regulations CONTAINED IN TABLE 4.402~~:~~.

~~1. *Size.* Signs shall be no greater than 8 feet in height and 18 square feet in area.~~

~~2. *Display*: Signs shall only be displayed from the start of construction to the end of construction, where access to the premises is impaired by the construction or traffic barriers are placed in the right of way that provide a visual distraction from ordinary business signage.~~

~~3. *Location.* Business identification banners shall be attached to poles or posts fixed to the ground or to parking or site screen fences.~~

~~4. *Prohibited Locations.* Business identification banners shall not be installed:~~

~~a. In the public right of way.~~

~~b. On landscaping, vehicles, utility facilities, or any other structure.~~

M. ***Interim Business Identification Banners.*** INTERIM Banners ARE PERMITTED IN CONFORMANCE WITH REGULATIONS CONTAINED IN TABLE 4.402. ~~identifying a~~

~~business are permitted from the date of application for a Certificate of Occupancy for the business until the date of installation of permanent signage, provided the applicant has a pending sign permit application for permanent signage and is diligently pursuing the manufacture and installation of such signage. Such signs shall be placed upon the building wall of the business.~~ Interim Banners shall not exceed the sign area permitted for temporary Wall Signs for the use~~,~~. ~~and shall not be displayed for a period exceeding 120 days.~~

* * *

O. ***~~Boutique~~BAZAAR Signs.*** Up to 3 off-site Temporary Signs advertising a ~~boutique~~BAZAAR may be displayed. ~~Boutique~~BAZAAR Signs shall not exceed 6 square feet in area and 6 feet in height. ~~Boutique~~BAZAAR Signs shall only be displayed during the hours that the ~~boutique~~BAZAAR is open. ~~Boutique~~BAZAAR Signs are prohibited on public property, including rights-of-way, and shall not be placed on any other sign or fixed structure. The person who installed the ~~Boutique~~BAZAAR Signs shall remove all signs at the end of the sale. If the person installing the signs is unknown, the property owner shall be responsible for removal.

P. ***Temporary Directional Signs Relating to a Qualifying Event.*** Temporary Directional Signs Relating to a Qualifying Event shall be permitted subject to the following regulations:

* * *

4. *Location.* Temporary Directional Signs Relating to a Qualifying Event may be located off-site and shall be placed at grade level. Signs MAY BE PLACED IN THE RIGHT-OF-WAY OR, WITH PERMISSION OF THE PRIVATE PROPERTY OWNER, ON PRIVATE PROPERTY ~~shall be placed only with the permission of the owner of the property on which they are placed~~. SIGNS SHALL RELATE ONLY TO EVENTS OCCURRING WITHIN THE TOWN.

5. *Prohibited Locations.* Temporary Directional Signs Relating to a Qualifying Event shall not be located~~:~~

~~a. In the public right of way.~~

~~b.~~a. On fences, boulders, planters, other signs, vehicles, utility facilities, or any structure.

* * *

Q. ***Address Signs.*** Each dwelling unit shall be clearly identified by a street or unit number. Each nonresidential building or group of buildings shall be identified by a street number, visible from adjacent streets, not to exceed 6 square feet in area. Required address signage is not counted as a part of the total sign area permitted for a building or group of buildings.

SEE SECTION 4.405A FOR MULTI-FAMILY ADDRESS DIRECTORY SIGNS.

* * *

SUBJECT TO ADMINISTRATIVE APPROVAL AND THE FOLLOWING OPERATIONAL LIMITATIONS:

a. DISPLAY: DISPLAYS MAY BE FULL COLOR. WHEN VISIBLE FROM PUBLIC RIGHTS-OF-WAY, DISPLAYS SHALL BE STATIC MESSAGES. FLASHING OR ANIMATED SIGNS ARE LIMITED TO INTERIOR PROJECT LOCATIONS AND SHALL NOT BE VISIBLE FROM PUBLIC RIGHTS-OF-WAY.

b. MINIMUM DISPLAY TIME: THE DIGITAL MESSAGE SHALL NOT CHANGE MORE THAN ONCE EVERY EIGHT (8) SECONDS.

c. TRANSITION METHOD: SHALL BE BY INSTANT CHANGE METHOD.

d. ILLUMINATION LEVELS: SHALL INCORPORATE PHOTOCELL/ LIGHT SENSORS, WITH AUTOMATIC DIMMING TECHNOLOGY THAT APPROPRIATELY ADJUSTS TO AMBIENT LIGHT CONDITIONS. DISPLAYS SHALL HAVE A BRIGHTNESS LEVEL OF NO GREATER THAN 0.3 FOOT CANDLES ABOVE

AMBIENT LIGHT CONDITIONS AS MEASURED BY FOOT CANDLE METER.

e. MAINTENANCE: ANY PERMITTED ELECTRONIC CHANGEABLE MESSAGE SIGN THAT MALFUNCTIONS, FAILS, OR CEASES TO OPERATE IN ITS USUAL OR NORMAL PROGRAMMED MANNER SHALL BE REPAIRED OR DISCONNECTED WITHIN FORTY-EIGHT (48) HOURS BY THE OWNER OR OPERATOR OF SUCH SIGN.

* * *

4.405 Residential

The following regulations shall apply to all single family and multi-family residential zoning districts.

A. ***Permanent Signs.***

* * *

4. *MULTI-FAMILY COMPLEX ADDRESS AND ENTRY SIGNS.*

a. ADDRESS DIRECTORY. AN ADMINISTRATIVELY APPROVED ADDRESS DIRECTORY SHALL BE PROVIDED AT PROPERTIES THAT HAVE MORE THAN EIGHT (8) BUILDINGS OR WHEN IN THE OPINION OF THE FIRE MARSHAL,

EMERGENCY RESPONSE MAY BE DELAYED DUE TO THE PHYSICAL LAYOUT OF THE COMPLEX, PURSUANT TO GILBERT FIRE DEPARTMENT REGULATION #2006-006.

b. *MULTI-FAMILY COMPLEX ENTRY SIGNS.* MAJOR ENTRIES TO MULTI-FAMILY RESIDENTIAL COMPLEXES MAY HAVE 1 ENTRY SIGN ON EACH SIDE OF THE STREET OR ENTRY DRIVEWAY, SUBJECT TO THE FOLLOWING:

(1) SIZE. SIGNS SHALL BE NO GREATER THAN 8 FEET IN HEIGHT AND 32 SQUARE FEET IN AREA;

(2) SETBACK. SIGNS SHALL BE SET BACK A MINIMUM OF 3 FEET BEHIND THE RIGHT-OF-WAY;

(3) DESIGN AND APPROVAL. SIGNS SHALL BE ARCHITECTURALLY COMPATIBLE WITH THE COMPLEX AND APPROVED ADMINISTRATIVELY.

B. ***Temporary Signs.***

1. *Builder's Sign Package.* A Builder's Sign Package is required for each residential development prior to the installation of any

Temporary Signs. The Builder's Sign Package shall comply with the following regulations:

a. Applicability. A Builder's Sign Package may be approved only for developments within the Town.

b. Term. A sign permit for a Builder's Sign Package is valid for ~~1 year~~3 YEARS from the date of issuance. ANY PLAN CHANGE TO A Builder's Sign Package ~~may be renewed annually~~SHALL REQUIRE A NEW PERMIT.

* * *

e. Off-Site Signage. ~~Two~~FOUR off-site Directional Signs are permitted. Signs shall not exceed 32 square feet in area and 8 feet in height, and are subject to the following regulations:

* * *

2. *Weekend Directional Signs.* Weekend Directional Signs shall comply with the following regulations:

* * *

f. Installation and Removal. Weekend Directional Signs shall be installed no earlier than ~~6:00~~4:00 p.m. on Friday of each week and shall be removed no later than 8:00 a.m. on the following Monday. Signs shall be installed no earlier than ~~6:00~~4:00 p.m. preceding any official U.S.

holiday and shall be removed by 8:00 a.m. the day following the holiday, or Monday if the holiday occurs on Friday.

* * *

4.406 Nonresidential Uses in Residential Zoning Districts

B. **Permanent Signs.**

* * *

3. *Freestanding Monument Signs.*

* * *

d. Changeable Message Signs. One-half (1/2) OF a Monument Sign area may be a Changeable Message Sign, subject to ~~Design Review Board~~ADMINISTRATIVE approval.

* * *

C. ***Temporary Signs.*** Temporary Signs shall comply with the REGULATIONS CONTAINED IN TABLE 4.402 AND THE following regulations:

1. ~~*Initial Display of Banners and Advertising Flags.* Banners and advertising Flags are permitted once during the first year of operation of a use, fur a period not to exceed 120 consecutive calendar days and commencing not earlier than 90 days prior to~~

BENJAMIN W. BULL
AZ Bar No. 009940
JEREMY D. TEDESCO
AZ Bar No. 023497
ALLIANCE DEFENSE FUND
15100 N. 90th Street
Scottsdale, AZ 85260
(480) 444-0020; (480) 444-0028 facsimile
jtedesco@telladf.org

DAVID A. CORTMAN
GA Bar No. 188810
ALLIANCE DEFENSE FUND
1000 Hurricane Shoals Rd., Ste D-600
Lawrenceville, GA 30043
(770)339-0774; (770)339-6744 facsimile
dcortman@telladf.org
Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA
PHOENIX DIVISION

Pastor Clyde Reed; and Good News Community Church, Plaintiffs, v. Town of Gilbert, Arizona; and Adam Adams in his official capacity as Code Compliance Manager, Defendants.	Case No. CV-07-522-PHX-SRB AMENDED VERIFIED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

I. INTRODUCTION

1. In March 2007, Plaintiffs filed a Verified Complaint against and moved to preliminarily enjoin the provision of the Town of Gilbert's Sign Code that discriminates against religious assembly signs by requiring them to be smaller in size, less in number, placed in less favorable locations, and displayed for much less time than political signs, ideological signs, and many other comparable signs. In April 2007, the Town of Gilbert and Adam Adams ("Defendants") assented to a stipulated preliminary injunction that prohibited them from enforcing this provision of the Town's Sign Code against the Plaintiffs. After this Court granted the stipulated preliminary injunction in May 2007, the Town set out to amend its Sign Code, and passed such amendment on January 8, 2008.

2. Incredibly, the amended Code discriminates against the Plaintiffs' religious signage in the same fundamental way as the original Code.[1] Religious assembly signs are still treated far less favorably than similar noncommercial and commercial signs under the amended Code; the Code still discriminates against signs based on their content; and the Code still favors commercial over noncommercial speech. Accordingly, Plaintiffs file this Amended Complaint challenging the Town's original and amended Codes, and concurrently file a

[1]In the context of this Amended 1 Complaint, the term "original Code" refers to the Town's Sign Code as it existed on the day Plaintiffs initiated this lawsuit (attached hereto as Exhibit 1), and the term "amended Code" refers to the Town's Sign Code as amended on January 8, 2008 (attached hereto as Exhibit 2).

motion for preliminary injunction against the amended Code.

3. Prior to its enactment, Plaintiffs' counsel advised Defendants' counsel that the amended Code did not cure the constitutional defects, but Defendants failed to heed this advice and enacted it anyway.

4. Nothing short of an order from this Court, ruling that Defendants' unapologetic discriminatory treatment of religious signs violates Plaintiffs' First Amendment rights, will rectify the Defendants astonishing lack of regard for the First Amendment and for the rights of religious institutions to display signs on the same terms as other similar signs.

II. JURISDICTION

5. This action arises under the United States Constitution, particularly the First and Fourteenth Amendments, under federal law, particularly 28 U.S.C. § 2201 and 42 U.S.C. §§ 1983 and 1988, and under state law, particularly Ariz. Rev. Stat. §41-1493.

6. This Court is vested with original jurisdiction over these federal claims by operation of 28 U.S.C. §§ 1331 and 1343; and over the supplemental state law claims under §1367.

7. This Court is vested with authority to grant the requested declaratory judgment by operation of 28 U.S.C. §§ 2201, *et seq*.

8. This Court is authorized to issue the requested injunctive relief pursuant to 42 U.S.C. §1983 and Rule 65 of the Federal Rules of Civil Procedure.

9. This Court is authorized to award any damages pursuant to 28 U.S.C. § 1343(4).

10. This Court is authorized to award attorneys' fees pursuant to 42 U.S.C. § 1988 and pursuant to Ariz. Rev. Stat. §41-1493.01(D).

III. VENUE

11. Venue is proper in the United States District Court for the District of Arizona under 28 U.S.C. § 1391(b), in that the events giving rise to the claim occurred within the district.

IV. IDENTIFICATION OF PLAINTIFFS

12. Plaintiff Clyde Reed is the Pastor of Good News Community Church and is a citizen and resident of the District.

13. Good News Presbyterian Church, the named party in the original complaint filed in this case, recently changed its name to Good News Community Church ("the Church"). The Church is an unincorporated association and is also located in the District.

14. Good News Community Church is a group of like-minded persons who have come together around a set of common Christian beliefs and purposes, and

seeks to promote those purposes through the Church.

15. Pastor Reed is charged with the responsibility of representing the Church in its day to day activities, including through preaching of the Word of God and meeting together for worship and fellowship on Sundays and on other days of the week.

V. IDENTIFICATION OF DEFENDANTS

16. The Town of Gilbert is a body politic which is able to sue and be sued in its corporate name.

17. The Town has adopted the original and amended Town of Gilbert Land Development Code ("Code") sections that discriminate against religious signage.

18. The Town, through its Code Compliance Department, has enforced the original Code sections against the Plaintiffs.

19. Defendant Adam Adams is the Code Compliance Manager of the Town's Code Compliance Department and is sued in his official capacity.

20. Defendant Adams enforced the original Code against the Plaintiffs in February 2007 when he informed the Church that it would be cited if it violated the terms of the original Code regarding religious assembly signs.

21. The Town acquiesces in, sanctions, and supports the actions of Defendant Adams in the enforcement of the original Code against Plaintiffs.

22. The amended Code, and specifically amended section 4.402P, applies to Plaintiffs' religious signs.

23. The Town, Defendant Adams, and its enforcement officials intend on enforcing the terms of the amended Code against Plaintiffs' religious signs.

VI. STATEMENT OF FACTS

The Defendants' Original and Amended Sign Codes

24. The Defendants' original and amended Sign Codes were adopted to serve the Town's interests in safety and aesthetics. (Ex. 1, § 4.401A; Ex. 2, p. 1.)

25. Defendants' Sign Code, both the original and amended versions, discriminate against certain signage based on the content of the sign.

26. Under the original and amended Codes, Ideological Signs may be limitless in number, are allowed without a permit, may be placed in all zoning districts, may be up to 20 square feet in area and 6 feet in height, and have no duration limit. (Ex. 1, at 4, § 4.402J.)

27. The amended code makes no changes to the Ideological Sign Provision.

28. Similarly, under the original and amended Codes, Political Signs are allowed without a permit, may be placed on property zoned for residential use, nonresidential use, undeveloped Town property, and Town rights-of-way, may be up to 32 square feet in area and 6 feet in height, and only require that they be removed 10 days following an election, with no time constraint on when they can be posted prior to an election. (Ex. 1, at 4, § 4.402I.)

29. The amended Code makes no changes to the Political Sign provision.

30. Under the original Code, Religious Assembly Temporary Directional Signs are not permitted in the public right-of-way, may not exceed 6 square feet in area nor 3 feet in height, no more than 4 signs may be placed on any property, a permit is required, and they shall not be displayed earlier than 2 hours before and 1 hour after the religious service. (Ex. 1, at 8, § 4.402P; Ex. 5 (requiring permit).)

31. The amended Code makes the following changes to the former Religious Assembly Directional Signs provision:

a. changes the name of the provision to "Temporary Directional Signs Relating To A Qualifying Event";

b. permits non-profit organizations to display signs relating to a qualifying event, in addition to religious assemblies;

c. increased the height of such signs to 6 feet, but maintained the 6 square feet in area requirement;

d. allows signs to be displayed for 12 hours before a qualifying event, but maintained the requirement that such signs be taken down within 1 hour of the event ending; and

e. clarifies that 4 signs per property are permitted for qualifying events. (Ex. 2, at 2-3, § 4.402P.)

32. The original and amended Codes also permit Weekend Directional Residential Signs, which advertise the sale of new homes. A total of 15 signs are permitted for each recorded subdivision plat, they may be placed on Town rights-of-way and each sign may be placed beginning 6 p.m. on Friday and ending at 8 a.m. on the following Monday. (Ex. 1, at 17-18, § 4.405B(2).)

33. The amended Code makes no changes to the Weekend Directional Residential Signs provision.

34. Lastly, the original and amended Codes permit Homeowners Association Facilities Temporary Signs for 30 days prior to each event and requires such signs to be removed within 48 hours of completion of the event. (Ex. 1, at 21, § 4.406C(3).)

35. The amended Code makes no changes to the Homeowners Facilities Temporary Signs provision.

36. All signs permitted under the Town's Codes may contain a noncommercial message. (Ex. 1, at 11, § 4.402V.)

37. The amended Code also makes some modifications to the Town's Glossary of Terms for its Sign Code. (Ex. 2, at 3.)

38. Among other changes, the following entry has been added to the Glossary of Terms:

> *Temporary directional signs relating to a qualifying event.* Temporary directional signs relating to a qualifying event means any temporary sign intended to direct pedestrians, motorists, and other passersby to a "qualifying event." A "qualifying event" is any assembly, gathering, activity, or meeting sponsored, arranged, or promoted by a religious, charitable, community service, educational, or other similar non-profit organization.

(Ex. 2, at 3.)

39. A true and accurate copy of the Town's Glossary of Terms is attached as Exhibit 3.

40. This action is brought to challenge the Town's original and amended Code provisions that deny equal treatment to Plaintiffs' religious signs.

The Church's Religious Beliefs

41. The Church currently averages around 45 attendees a week, and some weeks exceeds 50.

42. The Church, its members and leaders, and Pastor Reed are Christians who hold sincere religious beliefs that they must meet together with like-minded individuals, teach and preach the Gospel, sing religious songs, pray for their community, and encourage others whenever possible.

43. Plaintiffs believe in what is commonly referred to as the Great Commission.

44. The Bible commands believers in Matthew 28:19-20 to "go and make disciples of all nations, baptizing them in the name of the Father and of the Son and of the Holy Spirit, and teaching them to obey everything I have commanded you."

45. Plaintiffs believe that they should carry out this command by reaching out to the community to meet together on a regular basis.

46. Plaintiffs follow this Biblical directive by displaying signs announcing their services as an invitation for those in the community to attend.

47. Plaintiffs' services are open to the public and Plaintiffs seek to encourage new people from the community to attend.

48. A primary way in which the community may learn about Plaintiffs' services is through the signs that are placed announcing the time and location of the services.

49. The more Church signs that are permitted to be displayed, the longer such signs are permitted to be displayed, the larger such signs are permitted to be, and the more prominent location they are permitted to be located, the more people will receive the invitation.

The Enforcement of the Original Code Against the Church

50. Due to its small size, the church is limited financially in what it can afford to do to invite others to its meetings.

51. One effective, yet inexpensive means of reaching others is to display signs letting the community know where and when it is meeting.

52. The Church has been meeting at Coronado Elementary School for close to five years.

53. For a time, the Church was placing about 17 signs in the areas surrounding the Church.

54. These signs were placed early in the day each Saturday and removed following the services on Sunday mid-day.

55. On September 17, 2005, however, the Church was cited by the Town's Code Compliance

Department for exceeding the time limitation of 2 hours before and 1 hour after the service (with a notation on the citation that the date of service was missing from the sign). A true and accurate copy of this notice of violation is attached as Exhibit 4.

56. Earlier in the same year, on July 14, the Church received a citation from the Town's Code Compliance Department stating that its signs were in violation of the Code because they were placed more than 2 hours before its Church services. A true and accurate copy of this notice of violation is attached as Exhibit 5.

57. The penalties for violating the original (and amended) Code range from a notice of violation to substantial fines and time in jail.

58. After receiving these citations, the Church reduced the number of signs and the amount of time they placed the signs.

59. More visitors attended the services when all signs were being placed and when they were being placed earlier on Saturdays.

60. In February 2007, the Church contacted the Code Compliance Department to inquire as to whether the limitations found in the Code would be enforced against the Church if violated.

61. The Church was told by the Code Compliance Manager that there is no leniency under the Code, and that the Church would be cited if it

was determined that it had violated any of the applicable provisions in the Code.

62. Among other things, this meant the Church would be cited for a violation of the Code if it put up signs displaying the time and place of its meetings more than 2 hours before those meetings.

63. Also, the Church would be cited for a violation of the Code if it placed more than 4 signs displaying the time and place of its meetings.

64. Based on their fear that the Code would be enforced against them, and because they were censoring their speech based on such fear of enforcement, the Plaintiffs filed a Civil Rights lawsuit challenging the Town's discriminatory Code in March 2007.

65. After Plaintiffs filed a motion for preliminary injunction, the Defendants agreed to a stipulated preliminary injunction against enforcement of § 4.402P of the original Code.

66. This Court issued a stipulated preliminary injunction in May, 2007, prohibiting enforcement of § 4.402P against Plaintiffs' signs, and shortly thereafter the City began the process of amending its Sign Code.

The Ongoing Discriminatory Treatment of Plaintiffs' Religious Signs Under the Amended Code

67. In August, 2007, counsel for Defendants and counsel for Plaintiffs had a lengthy telephonic conference to discuss the proposed amendments to the Sign Code.

68. The amendments discussed during this conference are substantially the same as those adopted by the Town on January 8, 2008. The only difference is that the amended code discussed in August 2007 contained minor revisions to the Ideological Sign Provision that were not part of the code adopted on January 8, 2008.

69. Counsel for Plaintiffs unequivocally stated during this conference that the proposed amendments would not settle Plaintiffs' lawsuit, because the amended Code would still suffer from the same constitutional infirmities as the original Code.

70. Counsel for Defendants stated that Churches are privileged to be able to place any temporary signs, and that the Town could prohibit such religious assembly signs altogether.

71. On December 5, 2007, the Town of Gilbert Planning Commission held a public meeting at which the proposed amendments to the Sign Code were discussed.

72. Attached hereto as exhibit 6 is a true and accurate transcription of the portion of this meeting dealing with the amended Code.

73. During the December 5, 2007 meeting, and in response to a question from a Planning Commission member regarding whether the amended § 4.402P applied to signs placed by Home Owners Associations, the Town attorney stated that "[t]emporary signs for HOAs are treated elsewhere within the codes, they would not fall within this." (Ex. 6, at 3.)

74. At the same meeting, the Town attorney explained to the Planning Commission that "the code treats many different kinds of temporary signs differently." (Ex. 6, at 3.)

75. The amended Code's different treatment of temporary signs is based on the content of the message on the sign.

76. The Town Council passed the amended Code on January 8, 2008, and pursuant to the "emergency clause" in the amended Code (Ex. 2, at 4, § IV), the Code went into effect immediately.

77. Because the Defendants threatened to enforce the original Code against the Plaintiffs' signs, and because Defendant Adams told Pastor Reed that the Church would receive no leniency for any violations of the original Code, the Church understands that the Town's amended Code will be enforced against them if they display signs that in any way violate the provisions of the amended Code.

78. The Church has a continuing desire to reach out to the community through additional signs that may be placed in Town rights-of-way and for longer periods of time, but cannot place such signs due to the discriminatory treatment of Plaintiffs' religious signs under the amended Code, and due to their fear of enforcement of the amended Code against their signs.

79. The Church's speech is being squelched and it is being limited in the number of citizens it reaches with its invitation message due to the amended Code.

VII. ALLEGATIONS OF LAW

80. All acts of the Defendants, their officers, agents, servants, employees, or persons acting at their behest or direction, were done and are continuing to be done under the color and pretense of state law.

81. Plaintiffs have no adequate or speedy remedy at law to correct or redress the deprivations of their federal and state rights by Defendants.

82. Unless and until the enforcement of the original and amended Codes is enjoined, the Plaintiffs will suffer and continue to suffer irreparable injury to their rights.

VIII. CAUSES OF ACTION

1. First Cause of Action: Violation of the Free Speech Clause of the First Amendment

83. Plaintiffs reallege all matters set forth in the preceding paragraphs and incorporate them herein.

84. Plaintiffs' signs are speech that is protected by the First Amendment.

85. Defendants' original and amended Codes impermissibly regulate and restrict speech in the form of signs based on the content of that speech.

86. Signs that are ideological or political are permitted to a much greater extent than are Plaintiffs' religious signs.

87. Also, residential weekend directional signs are permitted to a much greater extent than Plaintiffs' religious signs.

88. Because such discrimination is based on the content of the signs, it is subject to strict scrutiny: it must further a compelling government interest and be narrowly tailored.

89. Defendants can proffer no interest, let alone one that is compelling, that justifies discriminating against Plaintiffs' religious signs.

90. Whatever interests Defendants cite, they apply equally to signs that are permitted to a greater extent than Plaintiffs' religious signs.

91. Further, limiting Plaintiffs' religious signs in the manner authorized by the original and amended Codes is not narrowly tailored to justify whatever interest Defendants may create.

92. Moreover, Defendants' original and amended Codes treat commercial speech more favorably than noncommercial speech.

93. The original and amended Codes allow weekend residential signs for the purposes of home sales for a longer period of time than Plaintiffs' religious signs.

94. The original and amended Codes impose an unconstitutional prior restraint because they vest Town officials with the unbridled discretion to permit or refuse protected speech without any guidelines or criteria.

95. The original and amended Codes are overbroad because they sweep within their ambit protected First Amendment speech.

96. The overbreadth of the original and amended Codes chill protected speech by discouraging individuals and groups from placing signs for the purpose of engaging in protected speech based on the religious nature of the sign.

97. Defendants' original and amended Codes on their face and as applied violate Plaintiffs' rights of Free Speech as guaranteed by the First Amendment to the United States Constitution as incorporated and applied to state action under the Fourteenth Amendment.

WHEREFORE, Plaintiffs respectfully pray that this Court grant the equitable and legal relief set forth hereinafter in the prayer for relief.

2. **Second Cause of Action: Violation of the Equal Protection Clause of the Fourteenth Amendment.**

98. Plaintiffs reallege all matters set forth in the preceding paragraphs and incorporate them herein.

99. The original and amended Codes allow groups and individuals similarly situated to religious assemblies, like Plaintiff, greater access to Town property.

100. The original and amended Codes allow groups and individuals similarly situated to religious assemblies, like Plaintiff, to display signs for greater time periods.

101. The original and amended Codes allow groups and individuals similarly situated to religious assemblies, like Plaintiff, to display larger signs.

102. The original and amended Codes allow groups and individuals similarly situated to religious

assemblies, like Plaintiff, to display a greater number of signs.

103. The Codes do not extend those same rights to religious assemblies, like Plaintiff.

104. Defendants can offer no compelling interest to justify their discriminatory treatment of certain religious speech and activities while allowing similar secular speech and activities.

105. The original and amended Codes facially and as applied violate Plaintiffs' rights under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

WHEREFORE, Plaintiffs respectfully pray that the Court grant the equitable and legal relief set forth hereinafter in the prayer for relief.

3. Third Cause of Action: Violation of the Free Exercise Clause of the First Amendment

106. Plaintiffs reallege all matters set forth in the preceding paragraphs and incorporate them herein.

107. Plaintiffs hold religious beliefs that they must reach out to the community and invite them to their religious services where they offer Biblical guidance on how to face contemporary issues.

108. Plaintiffs also communicate their faith to others in public places through invitations to gather

together with like-minded individuals for fellowship and receiving religious instruction as an exercise of their sincerely-held religious beliefs.

109. The original and amended Codes penalize the exercise of religion by subjecting it to greater restrictions that are not applicable to any other activities.

110. The original and amended Codes expressly discriminate against religion.

111. The original and amended Codes impose an excessive burden on religious exercise that is not generally applicable.

112. The original and amended Codes burden religious exercise to a greater extent than non-religious exercise.

113. Defendants have interpreted and applied their original Code to disqualify Plaintiffs from equal treatment solely because of the religious nature of Plaintiffs' activities and the religious content and viewpoint of Plaintiffs' speech.

114. The Defendants' amended Code similarly disqualifies Plaintiffs from equal treatment based solely on the religious nature, content, and viewpoint of their signs and activities.

115. Defendants' interpretation and application of the original Code impose an excessive burden on Plaintiffs' rights to the free exercise of religion.

116. The Defendants' amended Code similarly imposes an excessive burden on Plaintiffs' rights to the free exercise of religion.

117. Both the original and amended Codes, and Defendants' enforcement of the original Code against the Plaintiffs, violate several constitutional rights of Plaintiffs, including freedom of speech, free exercise, and equal protection, and therefore give rise to a hybrid claim.

118. No compelling government interest exists which could justify the original and amended Codes discriminatory treatment of Plaintiffs' religious signs, or Defendants' discriminatory enforcement of the original Code against Plaintiffs.

119. The original and amended Codes unequal treatment of Plaintiffs' religious signs, and the Defendants enforcement of the original Code prohibiting equal treatment of Plaintiffs' religious signs, are not the least restrictive means to serve any legitimate interest which Defendants seek thereby to secure.

120. The original and amended Codes discriminatory treatment of Plaintiffs' religious signs, and Defendants' interpretation and enforcement of the original Code against Plaintiffs, chill Plaintiffs' freedom of religious discussion and exercise, which are fundamental rights guaranteed Plaintiffs by the First Amendment.

121. The original and amended Codes facially and as applied thus violate Plaintiffs' rights under

the Free Exercise Clause of the First Amendment to the United States Constitution as incorporated and applied to state action under the Fourteenth Amendment.

WHEREFORE, Plaintiffs respectfully pray that the Court grant the equitable and legal relief set forth hereinafter in the prayer for relief.

4. **Fourth Cause of Action: Violation of the Arizona Religious Freedom Restoration Act**

122. Plaintiffs reallege all matters set forth in the preceding paragraphs and incorporate them herein.

123. The Arizona Religious Freedom Restoration Act, Ariz. Rev. Stat. §41-1493.01, states that government shall not substantially burden a person's exercise of religion unless it demonstrates a compelling government interest that is furthered by the least restrictive means.

124. Plaintiffs hold religious beliefs that they must reach out to the community and invite them to services offering Biblical guidance on how to face contemporary issues.

125. Plaintiffs also communicate their faith to others in public places by inviting them to gather together with like-minded individuals for fellowship and receiving religious instruction as an exercise of their sincerely-held religious beliefs.

126. The original and amended Codes penalize the exercise of religion by subjecting it to greater restrictions that are not applicable to any other activities.

127. The original and amended Codes expressly discriminate against religion.

128. The original and amended Codes impose an excessive burden on religious exercise that is not generally applicable.

129. Plaintiffs are severely limited in the exercise of their religion, including reaching out to others, based on the terms of Defendants' original and amended Codes.

130. Defendants have interpreted and applied their original Code to disqualify Plaintiffs from equal treatment solely because of the religious nature of Plaintiffs' activities and the religious content and viewpoint of Plaintiffs' speech.

131. Defendants' amended Code similarly disqualifies Plaintiffs from equal treatment solely because of the religious nature, content, and viewpoint of Plaintiffs' speech.

132. Defendants' interpretation and application of the original Code imposes an excessive burden on Plaintiffs' rights to the free exercise of religion.

133. Defendants' amended Code similarly imposes an excessive burden on Plaintiffs' free exercise rights.

134. No compelling government interest exists which could justify the original and amended Codes discriminatory treatment of Plaintiffs' religious signs, or Defendants' discriminatory enforcement of the original Code against Plaintiffs.

135. The original and amended Codes discriminatory treatment of Plaintiffs' religious signs, and the Defendants enforcement of the original Code prohibiting equal treatment of Plaintiffs' religious signs, are not the least restrictive means to serve any legitimate interest which Defendants seek thereby to secure.

136. Whatever interest Defendants seek to further by limiting Plaintiffs' religious signs, all other signage impacts those same interests in the same manner.

137. Defendants' interpretation and enforcement of the original and amended Codes chill Plaintiffs' freedom of religious discussion and exercise, which are fundamental rights guaranteed Plaintiffs by Arizona Law.

138. The original and amended Codes facially and as applied thus violate Plaintiffs' rights under the Arizona Religious Freedom Restoration Act.

WHEREFORE, Plaintiffs respectfully pray that the Court grant the equitable and legal relief set forth hereinafter in the prayer for relief.

VIII. PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully pray for judgment as follows:

a. That this Court render a Declaratory Judgment declaring that §4.402P of the Town's original and amended Codes is invalid facially and as applied under the Constitution of the United States and under the Arizona Religious Freedom Restoration Act;

b. That this Court issue an Injunction restraining enforcement of § 4.402P of the amended Code in all respects as challenged herein;

c. That this Court retain jurisdiction of this matter for the purpose of enforcing the Court's Order;

d. That this Court award Plaintiffs' costs and expenses of this action, including a reasonable attorneys' fees award, in accordance with 42 U.S.C. § 1988, the Arizona Religious Freedom Restoration Act, and other applicable law;

e. That this Court award nominal and compensatory damages in an amount to be determined by the finder of fact in accordance with the proof, plus interest at the legal rate until paid;

f. That this Court adjudge, decree and declare the rights and other legal relations of the parties to the subject matter here in controversy, in order that such declarations shall have the force and effect of final judgment; and

g. That this Court grant such other and further relief as the Court deems equitable, just, and proper.

Respectfully submitted this 10th day of January, 2008.

THE ALLIANCE DEFENSE FUND

s/Jeremy D. Tedesco
Benjamin W. Bull
AZ Bar No. 009940
bbull@telladf.org
Jeremy D. Tedesco
AZ Bar No. 023497
jtedesco@telladf.org
15100 N. 90th Street
Scottsdale, AZ
(480) 444-0020
(480) 444-0028 facsimile

David A. Cortman
GA Bar No. 188810
dcortman@telladf.org
1000 Hurricane Shoals Rd., Ste D-600
Lawrenceville, GA 30043
(770) 339-0774
(770) 339-6744 facsimile

VERIFICATION OF AMENDED COMPLAINT

I, Clyde Reed, a citizen of the United States and a resident of the District, have read the foregoing Amended Verified Complaint for Injunctive and Declaratory Relief, and declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the factual allegations set forth herein are true and correct.

Executed this the 8th day of January, 2008.

s/Clyde Reed
Clyde Reed, individually and
on behalf of Good News
Community Church

Exhibit 4 to Plaintiff's Amended Verified Complaint for Declaratory Injunctive Relief

GILBERT
ARIZONA

RELIGIOUS ASSEMBLIES TEMPORARY DIRECTIONAL SIGNS

ADVISORY FROM THE TOWN OF GILBERT'S CODE COMPLIANCE DEPARTMENT

Date: 9/17/05

Name: Good News Location: Higley South of Pecos

The Town's Land Development Code (LDC) Section 4.402, regulates Religious Assembly Temporary Directional signage, as follows:

4.402 P. Temporary directional signs for Religious Assembly uses shall be permitted subject to the following regulations:

- ☐ *Size. Signs shall be no greater than 3 feet in height and 6 square feet in area.*
- ☐ *Number. No more than 4 signs shall be displayed on one property at any time.*
- ☑ *Display. Signs shall only be displayed up to 2 hours before and 1 hour after the religious service and no date of service.*
- ☐ *Location. Religious Assembly temporary directional signs may be located off-site and shall be placed at grade level. Signs shall be placed only with the permission of the owner of the property on which they are placed.*

☐ *Prohibited Locations. Religious Assembly Temporary Directional Signs shall not be located:*
- *In the public right-of-way.*
- *On fences, boulders, planters, other signs, vehicles, utility facilities, or any structure.*

☐ *Construction. Signs shall be:*
- *Constructed of durable and weather-resistant materials.*
- *Anchored or weighted down to avoid being displaced in windy conditions, or otherwise be a safety hazard to the public.*

You have signage displayed contrary to the criteria noted above. Please correct this (these) violation(s) by complying with the above requirements. Repeated violations may attract a civil citation.

Thank you for your cooperation in this matter.

Sincerely,

Karen Coats Code Compliance Officer
(Tel: 503-6710)

Exhibit 5 to Plaintiff's Amended Verified Complaint for Declaratory Injunctive Relief

From: "Betty Rael" <BettyR@ci.gilbert.az.us>

To: "clydeannreed@yahoo.com" <clydeannreed@yahoo.com>

CC: "Tad Fagerholm" <TadF@ci.gilbert.az.us>

Subject: A- Frame sign violation in the Town of Gilbert

Date: Thu, 14 Jul 2005 14:04:20 - 0700

Date: July 14, 2005

Institute: Good New Presbyterian Church

A-Frame Signs were located at Ranch House Pkwy & Queen Creek, Southeast corner of Higley & Queen Creek and Southeast corner of Higley & Chandler Heights on Saturday July 9, 2005.

The Town of Gilbert's Unified Land Development Code, Section 3.62.D, specifically deals with Religious Institution Temporary Directional Signs stating that such signs are allowed BUT subject to the issuance of the following criteria:

- Only four such signs are allowed
- The signs must be covered by a current permit
- They can be placed only on private property AND with the written permission of the

property owner {this consent is necessary prior to a permit being issued)

- The signs are not permitted in the right of way
- **The signs can be displayed not more than two (2) hours before a religious service and one (1) hour after such service**
- The signs can be no more than six (6) square feet in area and shall be no higher than 3 feet
- The signs shall be constructed of a durable, weather-resistant material
- The signs shall not be a safety hazard to the public

A violation of the Town of Gilbert's sign code has been noted as indicated below:

- No permit in force
- **A-Frame signs on view too early occurring on Saturday July 9, 2005**
- Too many signs displayed
- Signs placed in the right-of-way
- Other _____

Thank you in anticipation of your co-operation in this matter. If you have any further question please call (480) 503-6821.

Thank you,

Tad Fagerholm
Code Compliance Officer
Town of Gilbert

Exhibit 6 to Plaintiff's Amended Verified Complaint for Declaratory Injunctive Relief

Town of Gilbert, Arizona
Planning Commission/Board of Adjustment Meeting
December 5, 2007
Downloaded from:
http://gilbert.granicus.comNiewPublisher.php?view_id=4

COMMISSION MEMBERS
John Sentz, Chairman
Anthony Bianchi, Vice Chairman
Dan Dodge
Chad Fuller
Karl Kohlhoff
Michael Monroe
Brigette Peterson
Jennifer Wittmann (Alternate)

CHAIRMAN SENTZ: With that I'd like to introduce Item 28, Z07 -110, Amendment to Zoning Code Sections 4.402 D, J and P. General Sign Regulations and an amendment to the Glossary of General Terms relating to Signs Not Requiring a Permit, Ideological Signs and Temporary Directional Signs. With that I'll open the public hearing and introduce Mr. Michael Milillo.

MICHAEL MILILLO: Thank you Chairman Senz, members of the commission. This case was initiated by the Planning Commission last month at the study session and required citizen review meeting. It is a request for an amendment to the Zoning Code Chapter 1 Zoning Regulations, Article

4.4, which is the sign regulations, specifically section 4.402 D, and I will correct what's in the staff report there is no J, it's really just D and P, which are the general sign regulations and an amendment to the codes glossary of general terms relating to signs not requiring a sign permit, ideological sign and temporary directional signs. This proposed text amendment will basically accomplish four things; the text amendment revises the current sign code provision relating to religious assembly temporary directional signs in order to allow other "qualifying events", which is a new term in the code, the opportunity to post directional signage to their temporary events. The second thing it will do is it will enhance the purpose for which such temporary directional signs are posted by increasing the size of such signage and extending the amount of time that they may be posted. Third the text amendment revises the definition of an ideological sign in the land development code's glossary of general terms to expressly exclude temporary directional signs relating to a qualifying event's signs. And finally, it adds a definition of a temporary directional sign relating to a qualifying event. As you may recall from the study session, the citizen review session, where you initiated this amendment, there is some litigation that has been filed against the Town of Gilbert relative to temporary directional signs for religious assembly and that is the main reason behind the processing of this text amendment but it is also to put these types of temporary signs on an even footing with other types of temporary signs that are allowed in the code. Page five of the staff report lists seven reasons for the staff support including establishing criteria for temporary directional signs

relating to a qualifying event signage. It regulates the size, number, display, location and prohibited locations for directional signs relating to a temporary qualifying event signage, and it makes it consistent with signage allowances for other temporary events in the town. It establishes a definition for temporary directional signs relating to a qualifying event in the glossary of general terms. It amends the definition of an ideological sign in the land development code's glossary of general terms to exclude temporary directional signs relating to a qualifying event. The proposed text amendment will support the purposes of the Gilbert General Plan. The proposed text amendment will not be detrimental to public health safety and general welfare of the persons living and working in the surrounding area and all required public notices, public meetings and hearings have been held in accordance will applicable state and local laws. For those reasons noted in the summary section, staff recommends that the Planning Commission recommend to the Town Council approval of Case Z07 -110. I'll be happy to answer any questions.

CHAIRMAN SENZ: Any questions for Mr. Milillo? Vice Chairman Bianchi.

VICE CHAIRMAN BIANCHI: Mike, why would we need to permit four signs on one property? Would that be per qualifying event or would that be for all potential qualifying events?

MICHAEL MILILLO: It basically clarifies this, four signs shall be displayed on a single property at any one time.

VICE CHAIRMAN BIANCHI: So it couldn't be four for one? It could just be a total of four, okay. And is that indicated, would that be for a parcel covered by a whole block, or, where they've all got street frontage, or?

MICHAEL MILILLO: It's for a single property that was applying for this type of signage. And if our attorney wants to clarify that.

VICE CHAIRMAN BIANCHI: So it could be for four events or it could be for one single qualifying event?

MICHAEL MILILLO: One single qualifying event.

CHAIRMAN SENTZ: Any other questions? I do have one. When you talk about other similar non-profits on page five, would HOAs come under that as well?

MICHAEL MILILLO: Religious, charitable, community service, education or similar non-profit organizations. I really am not sure if an HOA would fall under that. Let me ask our attorney.

ATTORNEY: Temporary signs for HOAs are treated elsewhere within the codes, they would not fall within this.

CHAIRMAN SENTZ: Okay, because up above we talked about garage sale signs, so, well I guess a religious group could have a garage sale sign, right?

ATTORNEY: Well, the code treats many different kinds of temporary signs differently. It has specific provisions for garage sales.

CHAIRMAN SENTZ: Okay. Thank you. Any other questions? Okay. Anyone here wish to speak on this item? With that I'll close the public hearing, bring it back to the Commission for a discussion and possible motion. Commissioner Dodge? I'm ready.

COMISSIONER DODGE: Mr. Chairman, for the reasons noted in the summary section of this report, I move to recommend to the Town Council approval of the amendment to the Zoning Code of Gilbert, Chapter 1 Zoning Regulations Article 4.4 Sign Regulations Section 4.402 D General Sign Regulations and an amendment to the Glossary of General Terms related to Signs Not Requiring a Sign Permit, Ideological Signs and Temporary Directional Signs.

CHAIRMAN SENTZ: Is there a second?

COMMISSIONER PETERSON: Second.

CHAIRMAN SENTZ: It's been moved by Commissioner Dodge, seconded by Commissioner Peterson. All in favor?

ALL COMMISSIONERS: I.

CHAIRMAN SENTZ: Opposed? Okay, it passes 7-0. Thank you.

CERTIFICATE

I certify that the foregoing is a true and accurate transcript from the relevant portion of the electronic sound recording of the December 5, 2007, Town of Gilbert, AZ Planning Commission/Board of Adjustment Meeting.

Dated: December 19, 2007

s/ Jessica Worley

Jessica Worley
Legal Assistant
Alliance Defense Fund
15100 N. 90th Street
Scottsdale, AZ 85260

Robert Grasso, Jr. – Bar No. 015087
Kim S. Alvarado – Bar No. 018216
GRASSO LAW FIRM, P.C.
Jackson Plaza
4600 South Mill Avenue, Suite 125
Tempe, Arizona 85282
Telephone (480) 730-5553
Facsimile (480) 730-2810
rgrasso@grassolawfirm.com
kalvarado@grassolawfirm.com
Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE DISTRICT OF ARIZONA

PASTOR CLYDE REED and GOOD NEWS PRESBYTERIAN CHURCH,

Plaintiffs,

vs.

TOWN OF GILBERT, ARIZONA and ADAM ADAMS in his official capacity as Code Compliance Manager,

Defendants.

Case No. CV 07-0522 PHX-SRB

ANSWER TO PLAINTIFFS' AMENDED VERIFIED COMPLAINT

Defendants Town of Gilbert, Arizona and Adam Adams, in his official capacity as the Town's Code Compliance Administrator (collectively Defendants), by and through undersigned counsel, hereby answer Plaintiffs' Amended Verified Complaint as follows:

I. INTRODUCTION

1. Paragraph 1 of Plaintiffs' Amended Verified Complaint, as part of a section entitled "Introduction," contains argumentative and conclusory allegations that are not capable of being admitted or denied. Defendants admit that it stipulated to a preliminary injunction concerning the sign ordinance and passed an amendment to the sign ordinance on January 8, 2008. To the extent that any of the allegations set forth in paragraph 1 of Plaintiffs' Amended Verified Complaint are intended to allege any form of liability or wrongdoing on the part of Defendants, those allegations are specifically denied.

2. Paragraph 2 of Plaintiffs' Amended Verified Complaint, as part of a section entitled "Introduction," contains argumentative and conclusory allegations that are not capable of being admitted or denied. To the extent that any of the allegations set forth in paragraph 2 of Plaintiffs' Amended Verified Complaint are intended to allege any form of liability or wrongdoing on the part of Defendants, those allegations are specifically denied.

3. Answering the allegations set forth in Paragraph 3 of Plaintiffs' Amended Verified Complaint, Defendants admit that Plaintiffs' counsel offered opinions concerning the constitutionality of the amended ordinance and deny the remaining allegations.

4. Paragraph 4 of Plaintiffs' Amended Verified Complaint, as part of a section entitled

"Introduction," contains argumentative and conclusory allegations that are not capable of being admitted or denied. To the extent that any of the allegations set forth in paragraph 4 of Plaintiffs' Amended Verified Complaint are intended to allege any form of liability or wrongdoing on the part of Defendants, those allegations are specifically denied.

II. JURISDICTION

5. Defendants admit that this Court has subject matter jurisdiction over this matter. To the extent that any of the allegations set forth in paragraph 5 of Plaintiffs' Amended Verified Complaint are intended to allege any form of liability or wrongdoing on the part of Defendants, those allegations are specifically denied.

6. Defendants admit that this Court has subject matter jurisdiction over this matter. To the extent that any of the allegations set forth in paragraph 6 of Plaintiffs' Amended Verified Complaint are intended to allege any form of liability or wrongdoing on the part of Defendants, those allegations are specifically denied.

7. Defendants admit that this Court has subject matter jurisdiction over this matter. To the extent that any of the allegations set forth in paragraph 7 of Plaintiffs' Amended Verified Complaint are intended to allege any form of liability or wrongdoing on the part of Defendants, those allegations are specifically denied.

8. Defendants admit that this Court has subject matter jurisdiction over this matter. To the extent that any of the allegations set forth in paragraph 8 of Plaintiffs' Amended Verified Complaint are intended to allege any form of liability or wrongdoing on the part of Defendants, those allegations are specifically denied.

9. Defendants admit that this Court has subject matter jurisdiction over this matter. To the extent that any of the allegations set forth in paragraph 9 of Plaintiffs' Amended Verified Complaint are intended to allege any form of liability or wrongdoing on the part of Defendants, those allegations are specifically denied.

10. Defendants admit that this Court has subject matter jurisdiction over this matter. To the extent that any of the allegations set forth in paragraph 10 of Plaintiffs' Amended Verified Complaint are intended to allege any form of liability or wrongdoing on the part of Defendants, those allegations are specifically denied.

III. VENUE

11. Defendants admit that venue is proper in this judicial district. To the extent that any of the allegations set forth in paragraph 11 of Plaintiffs' Amended Verified Complaint are intended to allege any form of liability or wrongdoing on the part of Defendants, those allegations are specifically denied.

IV. IDENTIFICATION OF PLAINTIFFS

12. Defendants lack sufficient knowledge or information to form a belief as to the allegations set forth in paragraph 12 of Plaintiffs' Amended Verified Complaint, and therefore deny the same.

13. Defendants lack sufficient knowledge or information to form a belief as to the allegations set forth in paragraph 13 of Plaintiffs' Amended Verified Complaint, and therefore deny the same.

14. Defendants lack sufficient knowledge or information to form a belief as to the allegations set forth in paragraph 14 of Plaintiffs' Amended Verified Complaint, and therefore deny the same.

15. Defendants lack sufficient knowledge or information to form a belief as to the allegations set forth in paragraph 15 of Plaintiffs' Amended Verified Complaint, and therefore deny the same.

V. IDENTIFICATION OF DEFENDANTS

16. Defendants admit the allegations set forth in paragraph 16 of Plaintiffs' Amended Verified Complaint.

17. Defendants admit that the Town has adopted and amended a Land Development Code and deny the remaining allegations set forth in paragraph 17 of Plaintiffs' Amended Verified Complaint.

18. Defendants admit that the Town's Code Compliance Department removed two signs attributed to the Good News Presbyterian Church in September 2005. Defendants lack sufficient knowledge or information to form a belief as to the remaining allegations set forth in paragraph 18 of Plaintiffs' Amended Verified Complaint, and therefore deny the same.

19. Defendants admit that Adams is the Code Compliance Administrator of the Town's Code Compliance Department. To the extent that any of the allegations set forth in paragraph 19 of Plaintiffs' Amended Verified Complaint are intended to allege any form of liability or wrongdoing on the part of Defendants, those allegations are specifically denied.

20. Defendants deny the allegations set forth in paragraph 20 of Plaintiffs' Amended Verified Complaint.

21. Defendants admit that the Town is vicariously liable for Adams' actions or omissions as Code Compliance Administrator. Defendants affirmatively allege that neither the Town nor Adams has any intent to enforce an ordinance no longer in effect. To the extent that any of the allegations set forth in paragraph 21 of Plaintiffs' Amended Verified Complaint are intended to allege any form of liability or wrongdoing on the part of Defendants, those allegations are specifically denied.

22. Because the term "Plaintiffs' religious signs" is not identified or defined, paragraph 22 of

Plaintiffs' Amended Verified Complaint is not capable of being admitted or denied. To the extent that any of the allegations set forth in paragraph 22 of Plaintiffs' Amended Verified Complaint are intended to allege any form of liability or wrongdoing on the part of Defendants, those allegations are specifically denied.

23. Because the term "Plaintiffs' religious signs" is not identified or defined, paragraph 23 of Plaintiffs' Amended Verified Complaint is not capable of being admitted or denied. To the extent that any of the allegations set forth in paragraph 23 of Plaintiffs' Amended Verified Complaint are intended to allege any form of liability or wrongdoing on the part of Defendants, those allegations are specifically denied.

VI. STATEMENT OF FACTS

24. Defendants admit the allegations set forth in paragraph 24 of Plaintiffs' Amended Verified Complaint.

25. Defendants deny the allegations set forth in paragraph 25 of Plaintiffs' Amended Verified Complaint concerning the Town's amended Land Development Code. Defendants affirmatively allege that neither the Town nor Adams has any intent of enforcing the original Land Development Code, and thus Plaintiffs' allegations concerning the "original" code are moot. To the extent that any of the allegations set forth in paragraph 25 of Plaintiffs' Amended Verified Complaint are intended to allege

any form of liability or wrongdoing on the part of Defendants, those allegations are specifically denied.

26. Defendants affirmatively allege that Chapter I, Article 4.402(J) of the Town's Land Development Code is an ordinance that speaks for itself. To the extent that any of the allegations set forth in paragraph 26 of Plaintiffs' Amended Verified Complaint are intended to allege any form of liability or wrongdoing on the part of Defendants, those allegations are specifically denied.

27. Answering the allegations set forth in paragraph 27 of Plaintiffs' Amended Verified Complaint, Defendants admit that the amended Land Development Code did not change the text of Chapter I, Article 4.402(J), but affirmatively allege that the amendments modified the definition of "ideological sign" in the Glossary of General Terms.

28. Defendants affirmatively allege that Chapter I, Article 4.402(I) of the Town's Land Development Code is an ordinance that speaks for itself. To the extent that any of the allegations set forth in paragraph 28 of Plaintiffs' Amended Verified Complaint are intended to allege any form of liability or wrongdoing on the part of Defendants, those allegations are specifically denied.

29. Defendants admit the allegations set forth in paragraph 29 of Plaintiffs' Amended Verified Complaint.

30. Defendants affirmatively allege that the original version of Chapter I, Article 4.402(P) of the

Town's Land Development Code was a document that speaks for itself. Defendants affirmatively allege that this provision has been superseded by amendment and that neither the Town nor Adams has any intent of enforcing the original provision. Thus, Plaintiffs' allegations concerning the "original" code are moot. To the extent that any of the allegations set forth in paragraph 30 of Plaintiffs' Amended Verified Complaint are intended to allege any form of liability or wrongdoing on the part of Defendants, those allegations are specifically denied.

31. Defendants affirmatively allege that the amended version of Chapter I, Article 4.402(P) of the Town's Land Development Code is an ordinance that speaks for itself. To the extent that any of the allegations set forth in paragraph 31 of Plaintiffs' Amended Verified Complaint are intended to allege any form of liability or wrongdoing on the part of Defendants, those allegations are specifically denied.

32. Defendants affirmatively allege that Chapter I, Article 4.405(B)(2) of the Town's Land Development Code is an ordinance that speaks for itself. To the extent that any of the allegations set forth in paragraph 32 of Plaintiffs' Amended Verified Complaint are intended to allege any form of liability or wrongdoing on the part of Defendants, those allegations are specifically denied.

33. Defendants admit the allegations set forth in paragraph 33 of Plaintiffs' Amended Verified Complaint.

34. Defendants affirmatively allege that Chapter I, Article 4.406(C)(3) of the Town's Land Development Code is an ordinance that speaks for itself. To the extent that any of the allegations set forth in paragraph 34 of Plaintiffs' Amended Verified Complaint are intended to allege any form of liability or wrongdoing on the part of Defendants, those allegations are specifically denied.

35. Defendants admit the allegations set forth in paragraph 35 of Plaintiffs' Amended Verified Complaint.

36. Defendants affirmatively allege that Chapter I, Article 4.402(V) of the Town's Land Development Code is an ordinance that speaks for itself. To the extent that any of the allegations set forth in paragraph 36 of Plaintiffs' Amended Verified Complaint are intended to allege any form of liability or wrongdoing on the part of Defendants, those allegations are specifically denied.

37. Defendants admit the allegations set forth in paragraph 37 of Plaintiffs' Amended Verified Complaint related to the Glossary of General Terms.

38. Defendants affirmatively allege that the Glossary of General Terms of the Town's amended Land Development Code is an ordinance that speaks for itself. To the extent that any of the allegations set forth in paragraph 38 of Plaintiffs' Amended Verified Complaint are intended to allege any form of liability or wrongdoing on the part of Defendants, those allegations are specifically denied.

39. Defendants admit that Exhibit 3 to Plaintiffs' Amended Verified Complaint is a true and correct copy of an earlier version of the Glossary of General Terms of the Town's Land Development Code, but it does not contain the amendments passed on January 8, 2008.

40. Defendants lack sufficient knowledge or information to form a belief as to the allegations set forth in paragraph 40 of Plaintiffs' Amended Verified Complaint, and therefore deny the same.

41. Defendants lack sufficient knowledge or information to form a belief as to the allegations set forth in paragraph 41 of Plaintiffs' Amended Verified Complaint, and therefore deny the same.

42. Defendants lack sufficient knowledge or information to form a belief as to the allegations set forth in paragraph 42 of Plaintiffs' Amended Verified Complaint, and therefore deny the same.

43. Defendants lack sufficient knowledge or information to form a belief as to the allegations set forth in paragraph 43 of Plaintiffs' Amended Verified Complaint, and therefore deny the same.

44. Defendants lack sufficient knowledge or information to form a belief as to the allegations set forth in paragraph 44 of Plaintiffs' Amended Verified Complaint, and therefore deny the same.

45. Defendants lack sufficient knowledge or information to form a belief as to the allegations set

forth in paragraph 45 of Plaintiffs' Amended Verified Complaint, and therefore deny the same.

46. Defendants lack sufficient knowledge or information to form a belief as to the allegations set forth in paragraph 46 of Plaintiffs' Amended Verified Complaint, and therefore deny the same.

47. Defendants lack sufficient knowledge or information to form a belief as to the allegations set forth in paragraph 47 of Plaintiffs' Amended Verified Complaint, and therefore deny the same.

48. Defendants lack sufficient knowledge or information to form a belief as to the allegations set forth in paragraph 48 of Plaintiffs' Amended Verified Complaint, and therefore deny the same.

49. Defendants lack sufficient knowledge or information to form a belief as to the allegations set forth in paragraph 49 of Plaintiffs' Amended Verified Complaint, and therefore deny the same.

50. Defendants lack sufficient knowledge or information to form a belief as to the allegations set forth in paragraph 50 of Plaintiffs' Amended Verified Complaint, and therefore deny the same.

51. Defendants lack sufficient knowledge or information to form a belief as to the allegations set forth in paragraph 51 of Plaintiffs' Amended Verified Complaint, and therefore deny the same.

52. Defendants lack sufficient knowledge or information to form a belief as to the allegations set

forth in paragraph 52 of Plaintiffs' Amended Verified Complaint, and therefore deny the same.

53. Defendants lack sufficient knowledge or information to form a belief as to the allegations set forth in paragraph 53 of Plaintiffs' Amended Verified Complaint, and therefore deny the same.

54. Defendants lack sufficient knowledge or information to form a belief as to the allegations set forth in paragraph 54 of Plaintiffs' Amended Verified Complaint, and therefore deny the same.

55. Defendants deny the allegations set forth in paragraph 55 of Plaintiffs' Amended Verified Complaint. Defendants affirmatively allege that in September 2005 the Town removed two signs bearing the name of Good News Presbyterian Church from the public right-of-way and called Clyde Reed to inform him of the removal. The Town issued an advisory notice to Reed.

56. Defendants deny the allegations set forth in paragraph 56 of Plaintiffs' Amended Verified Complaint. Defendants affirmatively allege that in July 2005 the Town's Code Compliance Department sent an e-mail communication to Clyde Reed about A-frame signs.

57. Answering the allegations set forth in paragraph 57 of Plaintiffs' Amended Verified Complaint, Defendants affirmatively allege that Chapter I, Article 4.4012 of the Town's Land Development Code is an ordinance that speaks for itself.

58. Defendants deny that the Town issued a citation to Plaintiffs. Defendants lack sufficient knowledge or information to form a belief as to the remaining allegations set forth in paragraph 58 of Plaintiffs' Amended Verified Complaint, and therefore deny the same.

59. Defendants lack sufficient knowledge or information to form a belief as to the allegations set forth in paragraph 59 of Plaintiffs' Amended Verified Complaint, and therefore deny the same.

60. Defendants deny the allegations set forth in paragraph 60 of Plaintiffs' Amended Verified Complaint. Defendants affirmatively allege that Clyde Reed called Adam Adams in March 2007, asked whether the Town would issue a citation to the Church if it violated the Land Development Code, and was informed that persons who violated the Code could receive a citation if the Town discovered the violation.

61. Defendants deny the allegations set forth in paragraph 61 of Plaintiffs' Amended Verified Complaint. Defendants affirmatively allege that Clyde Reed called Adam Adams in March 2007, asked whether the Town would issue a citation to the Church if it violated the Land Development Code, and was informed that persons who violated the Code could receive a citation if the Town discovered the violation.

62. Defendants deny the allegations set forth in paragraph 62 of Plaintiffs' Amended Verified Complaint. Moreover, Plaintiffs' allegations are moot

because neither the Town nor Adams has any intent to enforce an ordinance no longer in effect.

63. Defendants deny the allegations set forth in paragraph 63 of Plaintiffs' Amended Verified Complaint. Defendants affirmatively allege that Clyde Reed called Adam Adams in March 2007, asked whether the Town would issue a citation to the Church if it violated the Land Development Code, and was informed that persons who violate the Code could receive a citation if the Town discovered the violation.

64. Defendants lack sufficient knowledge or information to form a belief as to the remaining allegations set forth in paragraph 64 of Plaintiffs' Amended Verified Complaint, and therefore deny the same.

65. Defendants admit the allegations set forth in paragraph 65 of Plaintiffs' Amended Verified Complaint.

66. Answering the allegations set forth in paragraph 66 of Plaintiffs' Amended Verified Complaint, Defendants admit that the Town began the legislative process of amending certain provisions of the Land Development Code after stipulating to a preliminary injunction. Defendants affirmatively allege that the Court's stipulated preliminary injunction is part of the court record and speaks for itself.

67. Answering the allegations set forth in paragraph 67 of Plaintiffs' Amended Verified

Complaint, Defendants admit that Plaintiffs' counsel spoke by telephone with attorneys at Curtis Goodwin Sullivan Udall & Schwab, P.L.C., who represent the Town on various matters.

68. Defendants deny the allegations set forth in paragraph 68 of Plaintiffs' Amended Verified Complaint.

69. Defendants deny the allegations set forth in paragraph 69 of Plaintiffs' Amended Verified Complaint.

70. Defendants deny the allegations set forth in paragraph 70 of Plaintiffs' Amended Verified Complaint.

71. Defendants admit the allegations set forth in paragraph 71 of Plaintiffs' Amended Verified Complaint.

72. Defendants lack sufficient knowledge or information to form a belief as to the remaining allegations set forth in paragraph 72 of Plaintiffs' Amended Verified Complaint, and therefore deny the same.

73. To the extent that the allegations set forth in paragraph 73 of Plaintiffs' Amended Verified Complaint are intended as a quotation from a transcript prepared by a legal assistant for Plaintiffs' counsel (Exhibit 6 to Plaintiffs' Amended Verified Complaint), Defendants deny the allegations.

74. To the extent that the allegations set forth in paragraph 74 of Plaintiffs' Amended Verified Complaint are intended as a quotation from a transcript prepared by a legal assistant for Plaintiffs' counsel (Exhibit 6 to Plaintiffs' Amended Verified Complaint), Defendants deny the allegations.

75. Defendants deny the allegations set forth in paragraph 75 of Plaintiffs' Amended Verified Complaint.

76. Defendants admit the allegations set forth in paragraph 76 of Plaintiffs' Amended Verified Complaint.

77. Defendants deny the allegations set forth in paragraph 77 of Plaintiffs' Amended Verified Complaint concerning Defendants' alleged conduct or statements. Defendants lack sufficient knowledge or information to form a belief as to the remaining allegations set forth in paragraph 77 of Plaintiffs' Amended Verified Complaint, and therefore deny the same.

78. Defendants lack sufficient knowledge or information to form a belief as to the allegations set forth in paragraph 78 of Plaintiffs' Amended Verified Complaint, and therefore deny the same.

79. Defendants deny the allegations set forth in paragraph 79 of Plaintiffs' Amended Verified Complaint.

VII. ALLEGATIONS OF LAW

80. Defendants admit the Town employees who enforce the Land Development Code act under color of state law. To the extent that any of the allegations set forth in paragraph 80 of Plaintiffs' Amended Verified Complaint are intended to allege any form of liability or wrongdoing on the part of Defendants, those allegations are specifically denied.

81. Defendants deny the allegations set forth in paragraph 81 of Plaintiffs' Amended Verified Complaint.

82. Defendants deny the allegations set forth in paragraph 82 of Plaintiffs' Amended Verified Complaint concerning the amended Land Development Code. Defendants affirmatively allege that neither the Town nor Adams has any intent to enforce an ordinance no longer in effect, and therefore Plaintiffs' allegations concerning the original Land Development Code are moot.

FIRST CAUSE OF ACTION
(Violation of the Free Speech Clause of the First Amendment)

83. Because paragraph 83 of Plaintiffs' Amended Verified Complaint incorporates by reference the allegations set forth in all preceding paragraphs of Plaintiffs' Amended Verified Complaint, Defendants incorporate, by this reference, their responses to paragraphs 1 through 82 of Plaintiffs' Amended Verified Complaint.

84. Defendants admit the allegations set forth in paragraph 84 of Plaintiffs' Amended Verified Complaint.

85. Defendants deny the allegations set forth in paragraph 85 of Plaintiffs' Amended Verified Complaint concerning the amended Land Development Code. Defendants affirmatively allege that neither the Town nor Adams has any intent to enforce an ordinance no longer in effect, and therefore Plaintiffs' allegations concerning the original Land Development Code are moot.

86. Defendants deny the allegations set forth in paragraph 86 of Plaintiffs' Amended Verified Complaint.

87. Defendants deny the allegations set forth in paragraph 87 of Plaintiffs' Amended Verified Complaint.

88. Defendants deny the allegations set forth in paragraph 88 of Plaintiffs' Amended Verified Complaint.

89. Defendants deny the allegations set forth in paragraph 89 of Plaintiffs' Amended Verified Complaint.

90. Defendants deny the allegations set forth in paragraph 90 of Plaintiffs' Amended Verified Complaint.

91. Defendants deny the allegations set forth in paragraph 91 of Plaintiffs' Amended Verified

Complaint concerning the amended Land Development Code. Defendants affirmatively allege that neither the Town nor Adams has any intent to enforce an ordinance no longer in effect, and therefore Plaintiffs' allegations concerning the original Land Development Code are moot.

92. Defendants deny the allegations set forth in paragraph 92 of Plaintiffs' Amended Verified Complaint concerning the amended Land Development Code. Defendants affirmatively allege that neither the Town nor Adams has any intent to enforce an ordinance no longer in effect, and therefore Plaintiffs' allegations concerning the original Land Development Code are moot.

93. Defendants deny the allegations set forth in paragraph 93 of Plaintiffs' Amended Verified Complaint concerning the amended Land Development Code. Defendants affirmatively allege that neither the Town nor Adams has any intent to enforce an ordinance no longer in effect, and therefore Plaintiffs' allegations concerning the original Land Development Code are moot.

94. Defendants deny the allegations set forth in paragraph 94 of Plaintiffs' Amended Verified Complaint concerning the amended Land Development Code. Defendants affirmatively allege that neither the Town nor Adams has any intent to enforce an ordinance no longer in effect, and therefore Plaintiffs' allegations concerning the original Land Development Code are moot.

95. Defendants deny the allegations set forth in paragraph 95 of Plaintiffs' Amended Verified Complaint concerning the amended Land Development Code. Defendants affirmatively allege that neither the Town nor Adams has any intent to enforce an ordinance no longer in effect, and therefore Plaintiffs' allegations concerning the original Land Development Code are moot.

96. Defendants deny the allegations set forth in paragraph 96 of Plaintiffs' Amended Verified Complaint concerning the amended Land Development Code. Defendants affirmatively allege that neither the Town nor Adams has any intent to enforce an ordinance no longer in effect, and therefore Plaintiffs' allegations concerning the original Land Development Code are moot.

97. Defendants deny the allegations set forth in paragraph 97 of Plaintiffs' Amended Verified Complaint concerning the amended Land Development Code. Defendants affirmatively allege that neither the Town nor Adams has any intent to enforce an ordinance no longer in effect, and therefore Plaintiffs' allegations concerning the original Land Development Code are moot.

SECOND CAUSE OF ACTION
(Violation of the Equal Protection Clause of the Fourteenth Amendment)

98. Because paragraph 98 of Plaintiffs' Amended Verified Complaint incorporates by reference the allegations set forth in all preceding paragraphs of Plaintiffs' Amended Verified Complaint, Defendants

incorporate, by this reference, their responses to paragraphs 1 through 97 of Plaintiffs' Amended Verified Complaint.

99. Defendants deny the allegations set forth in paragraph 99 of Plaintiffs' Amended Verified Complaint concerning the amended Land Development Code. Defendants affirmatively allege that neither the Town nor Adams has any intent to enforce an ordinance no longer in effect, and therefore Plaintiffs' allegations concerning the original Land Development Code are moot.

100. Defendants deny the allegations set forth in paragraph 100 of Plaintiffs' Amended Verified Complaint concerning the amended Land Development Code. Defendants affirmatively allege that neither the Town nor Adams has any intent to enforce an ordinance no longer in effect, and therefore Plaintiffs' allegations concerning the original Land Development Code are moot.

101. Defendants deny the allegations set forth in paragraph 101 of Plaintiffs' Amended Verified Complaint concerning the amended Land Development Code. Defendants affirmatively allege that neither the Town nor Adams has any intent to enforce an ordinance no longer in effect, and therefore Plaintiffs' allegations concerning the original Land Development Code are moot.

102. Defendants deny the allegations set forth in paragraph 102 of Plaintiffs' Amended Verified Complaint concerning the amended Land Development Code. Defendants affirmatively allege

that neither the Town nor Adams has any intent to enforce an ordinance no longer in effect, and therefore Plaintiffs' allegations concerning the original Land Development Code are moot.

103. Defendants deny the allegations set forth in paragraph 103 of Plaintiffs' Amended Verified Complaint concerning the amended Land Development Code. Defendants affirmatively allege that neither the Town nor Adams has any intent to enforce an ordinance no longer in effect, and therefore Plaintiffs' allegations concerning the original Land Development Code are moot.

104. Defendants deny the allegations set forth in paragraph 104 of Plaintiffs' Amended Verified Complaint.

105. Defendants deny the allegations set forth in paragraph 105 of Plaintiffs' Amended Verified Complaint concerning the amended Land Development Code. Defendants affirmatively allege that neither the Town nor Adams has any intent to enforce an ordinance no longer in effect, and therefore Plaintiffs' allegations concerning the original Land Development Code are moot.

THIRD CAUSE OF ACTION
(Violation of the Free Exercise Clause of the First Amendment)

106. Because paragraph 106 of Plaintiffs' Amended Verified Complaint incorporates by reference the allegations set forth in all preceding paragraphs of Plaintiffs' Amended Verified

Complaint, Defendants incorporate, by this reference, their responses to paragraphs 1 through 105 of Plaintiffs' Amended Verified Complaint.

107. Defendants lack sufficient knowledge or information to form a belief as to the allegations set forth in paragraph 107 of Plaintiffs' Amended Verified Complaint, and therefore deny the same.

108. Defendants lack sufficient knowledge or information to form a belief as to the allegations set forth in paragraph 108 of Plaintiffs' Amended Verified Complaint, and therefore deny the same.

109. Defendants deny the allegations set forth in paragraph 109 of Plaintiffs' Amended Verified Complaint concerning the amended Land Development Code. Defendants affirmatively allege that neither the Town nor Adams has any intent to enforce an ordinance no longer in effect, and therefore Plaintiffs' allegations concerning the original Land Development Code are moot.

110. Defendants deny the allegations set forth in paragraph 110 of Plaintiffs' Amended Verified Complaint concerning the amended Land Development Code. Defendants affirmatively allege that neither the Town nor Adams has any intent to enforce an ordinance no longer in effect, and therefore Plaintiffs' allegations concerning the original Land Development Code are moot.

111. Defendants deny the allegations set forth in paragraph 111 of Plaintiffs' Amended Verified Complaint concerning the amended Land

Development Code. Defendants affirmatively allege that neither the Town nor Adams has any intent to enforce an ordinance no longer in effect, and therefore Plaintiffs' allegations concerning the original Land Development Code are moot.

112. Defendants deny the allegations set forth in paragraph 112 of Plaintiffs' Amended Verified Complaint concerning the amended Land Development Code. Defendants affirmatively allege that neither the Town nor Adams has any intent to enforce an ordinance no longer in effect, and therefore Plaintiffs' allegations concerning the original Land Development Code are moot.

113. Defendants deny the allegations set forth in paragraph 113 of Plaintiffs' Amended Verified Complaint. Defendants affirmatively allege that neither the Town nor Adams has any intent to enforce an ordinance no longer in effect, and therefore Plaintiffs' allegations concerning the original Land Development Code are moot.

114. Defendants deny the allegations set forth in paragraph 114 of Plaintiffs' Amended Verified Complaint.

115. Defendants deny the allegations set forth in paragraph 115 of Plaintiffs' Amended Verified Complaint. Defendants affirmatively allege that neither the Town nor Adams has any intent to enforce an ordinance no longer in effect, and therefore Plaintiffs' allegations concerning the original Land Development Code are moot.

116. Defendants deny the allegations set forth in paragraph 116 of Plaintiffs' Amended Verified Complaint.

117. Defendants deny the allegations set forth in paragraph 117 of Plaintiffs' Amended Verified Complaint. Defendants affirmatively allege that neither the Town nor Adams has any intent to enforce an ordinance no longer in effect, and therefore Plaintiffs' allegations concerning the original Land Development Code are moot.

118. Defendants deny the allegations set forth in paragraph 118 of Plaintiffs' Amended Verified Complaint. Defendants affirmatively allege that neither the Town nor Adams has any intent to enforce an ordinance no longer in effect, and therefore Plaintiffs' allegations concerning the original Land Development Code are moot.

119. Defendants deny the allegations set forth in paragraph 119 of Plaintiffs' Amended Verified Complaint. Defendants affirmatively allege that neither the Town nor Adams has any intent to enforce an ordinance no longer in effect, and therefore Plaintiffs' allegations concerning the original Land Development Code are moot.

120. Defendants deny the allegations set forth in paragraph 120 of Plaintiffs' Amended Verified Complaint. Defendants affirmatively allege that neither the Town nor Adams has any intent to enforce an ordinance no longer in effect, and therefore Plaintiffs' allegations concerning the original Land Development Code are moot.

121. Defendants deny the allegations set forth in paragraph 121 of Plaintiffs' Amended Verified Complaint. Defendants affirmatively allege that neither the Town nor Adams has any intent to enforce an ordinance no longer in effect, and therefore Plaintiffs' allegations concerning the original Land Development Code are moot.

FOURTH CAUSE OF ACTION
(Violation of the Arizona Religious Freedom Restoration Act)

122. Because paragraph 122 of Plaintiffs' Amended Verified Complaint incorporates by reference the allegations set forth in all preceding paragraphs of Plaintiffs' Amended Verified Complaint, Defendants incorporate, by this reference, their responses to paragraphs 1 through 121 of Plaintiffs' Amended Verified Complaint.

123. Defendants affirmatively allege that section 41-1493 of the Arizona Revised Statutes is a statute that speaks for itself. To the extent that any of the allegations set forth in paragraph 123 of Plaintiffs' Amended Verified Complaint are intended to allege any form of liability or wrongdoing on the part of Defendants, those allegations are specifically denied.

124. Defendants lack sufficient knowledge or information to form a belief as to the allegations set forth in paragraph 124 of Plaintiffs' Amended Verified Complaint, and therefore deny the same.

125. Defendants lack sufficient knowledge or information to form a belief as to the allegations set forth in paragraph 125 of Plaintiffs' Amended Verified Complaint, and therefore deny the same.

126. Defendants deny the allegations set forth in paragraph 126 of Plaintiffs' Amended Verified Complaint. Defendants affirmatively allege that neither the Town nor Adams has any intent to enforce an ordinance no longer in effect, and therefore Plaintiffs' allegations concerning the original Land Development Code are moot.

127. Defendants deny the allegations set forth in paragraph 127 of Plaintiffs' Amended Verified Complaint. Defendants affirmatively allege that neither the Town nor Adams has any intent to enforce an ordinance no longer in effect, and therefore Plaintiffs' allegations concerning the original Land Development Code are moot.

128. Defendants deny the allegations set forth in paragraph 128 of Plaintiffs' Amended Verified Complaint. Defendants affirmatively allege that neither the Town nor Adams has any intent to enforce an ordinance no longer in effect, and therefore Plaintiffs' allegations concerning the original Land Development Code are moot.

129. Defendants deny the allegations set forth in paragraph 129 of Plaintiffs' Amended Verified Complaint. Defendants affirmatively allege that neither the Town nor Adams has any intent to enforce an ordinance no longer in effect, and

therefore Plaintiffs' allegations concerning the original Land Development Code are moot.

130. Defendants deny the allegations set forth in paragraph 130 of Plaintiffs' Amended Verified Complaint. Defendants affirmatively allege that neither the Town nor Adams has any intent to enforce an ordinance no longer in effect, and therefore Plaintiffs' allegations concerning the original Land Development Code are moot.

131. Defendants deny the allegations set forth in paragraph 131 of Plaintiffs' Amended Verified Complaint.

132. Defendants deny the allegations set forth in paragraph 132 of Plaintiffs' Amended Verified Complaint. Defendants affirmatively allege that neither the Town nor Adams has any intent to enforce an ordinance no longer in effect, and therefore Plaintiffs' allegations concerning the original Land Development Code are moot.

133. Defendants deny the allegations set forth in paragraph 133 of Plaintiffs' Amended Verified Complaint.

134. Defendants deny the allegations set forth in paragraph 134 of Plaintiffs' Amended Verified Complaint. Defendants affirmatively allege that neither the Town nor Adams has any intent to enforce an ordinance no longer in effect, and therefore Plaintiffs' allegations concerning the original Land Development Code are moot.

135. Defendants deny the allegations set forth in paragraph 135 of Plaintiffs' Amended Verified Complaint. Defendants affirmatively allege that neither the Town nor Adams has any intent to enforce an ordinance no longer in effect, and therefore Plaintiffs' allegations concerning the original Land Development Code are moot.

136. Defendants deny the allegations set forth in paragraph 136 of Plaintiffs' Amended Verified Complaint.

137. Defendants deny the allegations set forth in paragraph 137 of Plaintiffs' Amended Verified Complaint. Defendants affirmatively allege that neither the Town nor Adams has any intent to enforce an ordinance no longer in effect, and therefore Plaintiffs' allegations concerning the original Land Development Code are moot.

138. Defendants deny the allegations set forth in paragraph 138 of Plaintiffs' Amended Verified Complaint. Defendants affirmatively allege that neither the Town nor Adams has any intent to enforce an ordinance no longer in effect, and therefore Plaintiffs' allegations concerning the original Land Development Code are moot.

139. Defendants deny that Plaintiffs are entitled to any of the remedies requested in their prayer for relief.

Defendants specifically deny each and every allegation of Plaintiffs' Amended Verified Complaint not expressly admitted herein.

AFFIRMATIVE DEFENSES

1. For their first and separate affirmative defense, Defendants allege that Plaintiffs lack standing to bring these claims.

2. For their second and separate affirmative defense, Defendants allege that the Good News Community Church lacks capacity to sue.

3. For their third and separate affirmative defense, Defendants allege that they are entitled to all privileges, immunities, and defenses extended to public entities and public employees pursuant to state and federal law.

4. For their fourth and separate affirmative defense, Defendants allege that Plaintiffs' claims based on the original Land Development Code are moot.

5. For their fifth and separate affirmative defense, Defendants allege that Plaintiffs' Amended Verified Complaint fails to state a claim on which relief can be granted.

6. Additional facts may be revealed by future discovery that support additional affirmative defenses available to Defendants. Accordingly, Defendants incorporate, by this reference, all of the affirmative defenses set forth in Rules 8 and 12 of the Federal Rules of Civil Procedure.

Having fully answered Plaintiffs' Amended Verified Complaint, Defendants respectfully request

that this action be dismissed with prejudice, that Plaintiffs be ordered to pay the attorneys' fees and costs incurred by Defendants, and for any further relief as the Court deems just and proper.

RESPECTFULLY SUBMITTED this 27th day of February, 2008.

GRASSO LAW FIRM P.C.

By s/Kim S. Alvarado

Robert Grasso, Jr.
Kim S. Alvarado
Jackson Plaza
4600 South Mill Avenue,
Suite 125
Tempe, Arizona 85282
Attorneys for Defendants

Exhibit 1 to Plaintiffs' Second Motion for Preliminary Injunction and Memorandum of Law in Support (Pictures of Plaintiffs' Signs Promoting Church Services)

PETITIONER'S BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
SEP 15 2014
OFFICE OF THE CLERK

No. 13-502

IN THE
Supreme Court of the United States

PASTOR CLYDE REED AND GOOD NEWS COMMUNITY CHURCH,
Petitioners,

v.

TOWN OF GILBERT, ARIZONA; AND ADAM ADAMS, IN HIS OFFICIAL CAPACITY AS CODE COMPLIANCE MANAGER,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR PETITIONERS

Kevin H. Theriot
Jeremy D. Tedesco
Alliance Defending Freedom
15100 N. 90th Street
Scottsdale, AZ 85260
(480) 444-0020

David A. Cortman
Counsel of Record
Rory T. Gray
Alliance Defending Freedom
1000 Hurricane Shoals Rd.
N.E., Ste. D-1100
Lawrenceville, GA 30043
dcortman@alliance
defendingfreedom.org
(770) 339-0774

Counsel for Petitioners

Library of Congress
Law Library

QUESTION PRESENTED

Does Gilbert's mere assertion of a lack of discriminatory motive render its facially content-based sign code content neutral and justify the code's differential treatment of Petitioners' religious signs?

PARTIES TO THE PROCEEDING

Petitioners are Good News Community Church and its pastor, Clyde Reed (hereinafter collectively "Good News" or "the Church"). Respondents are the Town of Gilbert, Arizona, and Adam Adams in his official capacity as the Town's Code Compliance Manager (hereinafter collectively "Gilbert").

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

CONSTITUTIONAL PROVISIONS AND ORDINANCES 2

INTRODUCTION 2

STATEMENT OF THE CASE 7

A. Statement of Facts 7

1. Petitioners' Church Invitation Signs 7

2. Gilbert's Content-Based Sign Code 9

3. Gilbert's Content-Based Regulation of Signs Has Persisted Throughout this Litigation 13

B. Procedural Background 17

SUMMARY OF ARGUMENT 19

ARGUMENT 22

I. Content Neutrality Is Determined Based on a Regulation's Plain Text. 22

II. Gilbert's Code Fails the Content Neutrality Test. 25

A. Gilbert's Sign Code Draws Content-Based Distinctions on its Face and As-Applied Treats Good News' Signs Far Worse than Similar Signs. 25

B. Lack of Illicit Motive Cannot Save a Content-Based Regulation. 34

C. Gilbert's Code Is Content Based Because Enforcement Officials Must Determine What a Sign Says to Decide What Limitations Apply. 38

D. Gilbert's Valuing of Political and Ideological Speech Over Good News' Religious Speech Further Demonstrates the Content-Based Nature of the Code. 43

III. Gilbert's Code Does Not Survive Strict Scrutiny. 47

A. Gilbert's Interests Are Not Compelling. 48

B. Gilbert's Code Cannot Satisfy Narrow Tailoring Under Strict or Intermediate Scrutiny. 50

CONCLUSION 53

TABLE OF AUTHORITIES

Cases:

Arkansas Writers' Project v. Ragland,
481 U.S. 221 (1987).....35

Brown v. Entertainment Merchants Association,
131 S. Ct. 2729 (2011).....47, 49, 51

Brown v. Town of Cary,
706 F.3d 294 (4th Cir. 2013) 36

Burson v. Freeman,
504 U.S. 191 (1992).....23-24

Capitol Square Review & Advisory Board v. Pinette,
515 U.S. 753 (1995).....46

Carey v. Brown,
447 U.S. 455 (1980).....24, 43-44, 49-52

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,
508 U.S. 520 (1993).....6-7, 49

Citizens United v. Federal Election Commission,
558 U.S. 310 (2010).....30

City of Boerne v. Flores,
521 U.S. 507 (1997).....47

City of Cincinnati v. Discovery Network,
507 U.S. 410 (1993)..... 27, 34-35, 43-44, 52-53

City of Lakewood v. Plain Dealer Publishing Co.,
486 U.S. 750 (1988).....41

City of Los Angeles v. Alameda Books, Inc.,
535 U.S. 425 (2002).....23

Consolidated Edison Co. of New York v. Public Service Commission,
447 U.S. 530 (1980).....29-30, 32-33, 52

F.C.C. v. League of Women Voters of California,
468 U.S. 364 (1984).....38

H.D.V.-Greektown, LLC v. City of Detroit,
568 F.3d 609 (6th Cir. 2009) 36

Hill v. Colorado,
530 U.S. 703 (2000).....37, 41-43

Holder v. Humanitarian Law Project,
561 U.S. 1 (2010).....28

McCullen v. Coakley,
134 S. Ct. 2518 (2014).....23, 38-39

Members of City Council of City of Los Angeles v. Taxpayers for Vincent,
466 U.S. 789 (1984).....46-47

Metromedia, Inc. v. City of San Diego,
453 U.S. 490 (1981).....46

Minneapolis Star & Tribune Co. v. Minnesota. Commissioner of Revenue,
460 U.S. 575 (1983).....35

NAACP v. Button,
371 U.S. 415 (1963).....35

National Advertising Co. v. City of Orange,
861 F.2d 246 (9th Cir. 1988) 48

Neighborhood Enterprises, Inc. v. City of St. Louis,
644 F.3d 728 (8th Cir. 2011) 37

Police Department of City of Chicago v. Mosley,
408 U.S. 92 (1972).....23, 27, 31, 51

R.A.V. v. City of St. Paul,
505 U.S 377 (1992).....29, 33

Regan v. Time, Inc.,
468 U.S. 641 (1984).....24, 43-44

Simon & Schuster v. Members of New York State Crime Victims Board,
502 U.S. 105 (1991).....35

Solantic, LLC v. City of Neptune Beach,
410 F.3d 1250 (11th Cir. 2005).....37, 48

Sorrell v. IMS Health Inc.,
131 S. Ct. 2653 (2011).....23, 28

Turner Broadcasting System, Inc. v. FCC,
512 U.S. 622 (1994).....6, 23-24, 29

United States v. Playboy Entertainment Group,
529 U.S. 803 (2000).....23, 29

United States v. Stevens,
559 U.S. 460 (2010).....28, 43-44, 46

Wagner v. City of Garfield Heights, Ohio,
No. 13-3474, 2014 WL 4067171 (6th Cir.
Aug. 19, 2014) 5-6

Ward v. Rock Against Racism,
91 U.S. 781 (1989).....37

Whitton v. City of Gladstone,
54 F.3d 1400 (8th Cir. 1995) 48

Widmar v. Vincent,
454 U.S. 263 (1981).....24

Statutes:

28 U.S.C. § 1254(1).....1

A.R.S. § 16-201 4

A.R.S. § 16-204 4

Other Authorities:

Good News' website,
http://www.goodnewspres.com/location.htm 8

Merriam-Webster Unabridged Dictionary Online,
available at http://www.merriam-
webster.com/dictionary/advertise 33

OPINIONS BELOW

The Ninth Circuit opinion affirming the district court's summary judgment ruling is reported at 707 F.3d 1057 and reprinted in the Petition Appendix (Pet. App.) at 1a-52a. The court's order denying rehearing en banc is unreported but reprinted at Pet. App. 141a. The district court's unreported order granting Gilbert's summary judgment motion, and denying Good News', is available at No. CV 07–522–PHX–SRB, 2011 WL 5924381 (D. Ariz. Feb. 11, 2011) and reprinted at Pet. App. 53a-84a.

The Ninth Circuit opinion affirming in part and remanding in part the district court's preliminary injunction order is reported at 587 F.3d 966 and reprinted at Pet. App. 85a-115a. The district court's unreported ruling denying Good News' second preliminary injunction motion is reprinted at Pet. App. 116a-140a.

STATEMENT OF JURISDICTION

The Court of Appeals rendered its decision on February 8, 2013, and denied the petition for rehearing en banc on July 24, 2013. The petition was filed on October 21, 2013, and granted on July 1, 2014. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

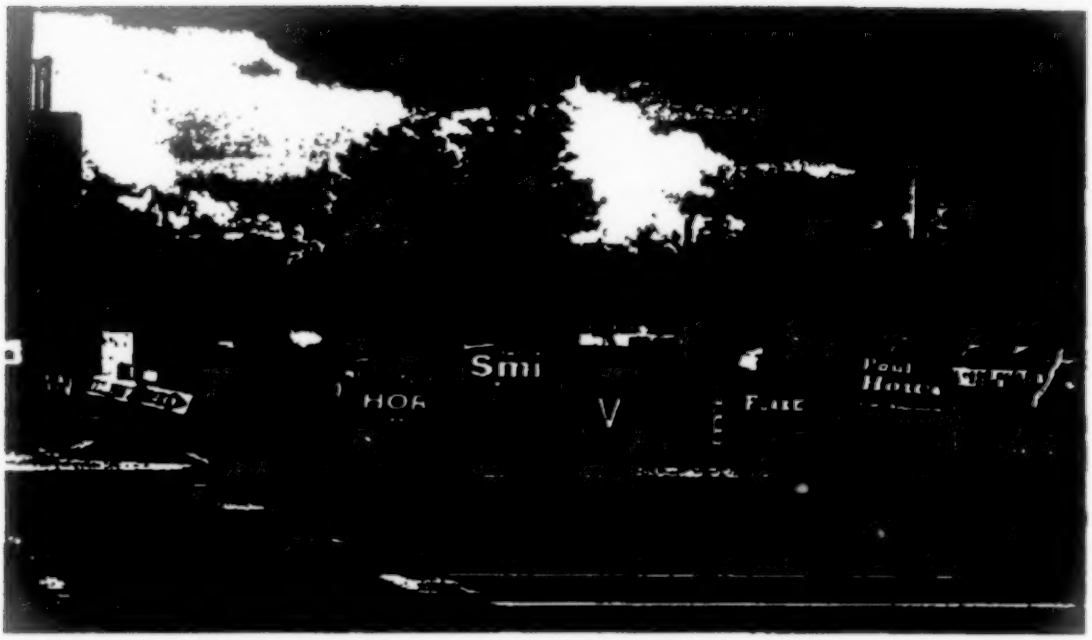
CONSTITUTIONAL PROVISIONS AND ORDINANCES

U.S. Const. amend. I & XIV are set out in pertinent part at Pet. App. 159a. Pertinent excerpts of Gilbert's Sign Code and Glossary, and the amendments thereto, are set forth at Joint Appendix ("App.") at 25-94.

INTRODUCTION

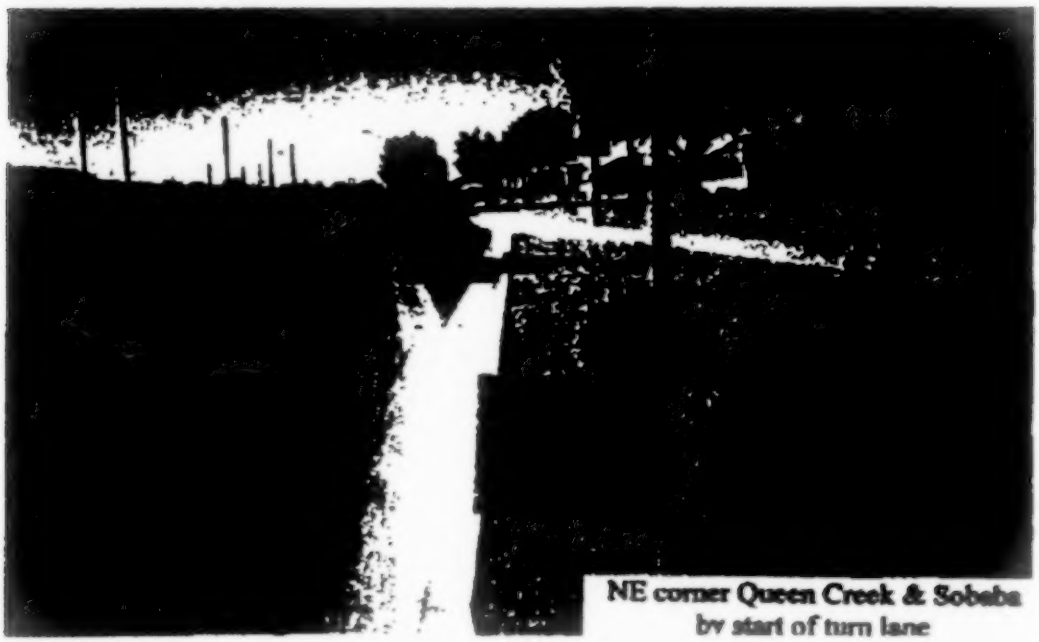
This case proves the truth of the old adage "a picture is worth a thousand words." Just a few images demonstrate that Gilbert's Sign Code regulates signs based on their content as well as any comprehensive recitation of the facts could.

Gilbert's Code freely allows political and several other categories of noncommercial, temporary signs. Thus, it is common for those driving through Gilbert to be bombarded with political signs, as depicted in the following picture:



Excerpts of Record 204, 9th Cir. Case No. 11-15588, Doc. 8 (hereinafter "ER"). Many additional pictures in the record show how the Code allows political signs to proliferate. *See* ER 87-120, 194-218.

Yet because of the severe limits Gilbert imposes on Petitioners' signs, drivers would almost certainly *not* come across one inviting them to Good News' church services:



ER 873.

This stark visual depiction of Gilbert's unequal treatment of similar signs captures the constitutional defect with Gilbert's Sign Code: it regulates noncommercial, temporary signs based on their content. Worse, the Code makes content-based distinctions among temporary signs even though they all raise the same safety and aesthetic concerns. Worse still, Gilbert grants highly favorable treatment to temporary political signs despite the fact that they pose the greatest threat to its interests because of their far greater number.

Simply put, to prevail in this case, Gilbert must explain why a 32 square foot sign displayed in the right-of-way virtually all year long is not a threat to safety and aesthetics if it bears a political message, but it *is* such a threat if it invites people to Good News' church services.[1] Gilbert has never provided a satisfactory explanation to this question because none exists.

---

[1] The Code generally allows Political Signs (whether related to candidates or ballot issues) to be displayed 60 days before and 15 days after an election. App. 84. But candidates who prevail in a primary election may display their signs for the additional ten weeks between the primary and general elections, for a total of 5 months of uninterrupted display time. *Id.*; Ariz. Rev. Stat. § 16-201 (providing that primary elections occur ten weeks prior to general elections). With Arizona law permitting non-candidate (except vacancy or recall) elections to occur on four separate dates evenly spread throughout the year, A.R.S. § 16-204(B), (E), & (F), Political Signs may be displayed virtually all year long in Gilbert.

Gilbert officials grant themselves—through the favorable Political Sign provision—and other noncommercial sign placers broad access to communicate messages through signage. Good News, a small, financially-hamstrung, and frequently on the move Church that meets in temporary facilities, simply desires equal treatment. Gilbert has repeatedly stymied this eminently reasonable (and constitutionally required) request.

In fact, virtually nothing has changed since Good News commenced this lawsuit in 2007. At that time, Gilbert's Code imposed a near complete ban on the Church's signs through a provision directed at "Religious Assembly" signs while liberally allowing Political, Ideological, and other noncommercial signs, and subjected Pastor Reed to fines and possible jail time if he violated the Code. Today, after seven years of litigation and two amendments to the Code, Good News' religious signs are still heavily restricted in comparison to Political, Ideological, and other noncommercial signs, and Pastor Reed still risks fines and jail time if he violates the Code. This Court should rectify this longstanding violation of Good News' constitutional rights.

It should also resolve the deeply entrenched circuit conflict over the role of governmental motive or purpose in judging whether a sign code is content neutral. Just a few weeks ago, the Sixth Circuit issued an opinion that highlighted this conflict and reaffirmed that for it and several other circuits "'content based' is a term of art that refers to a distinction based on content *because of an impermissible purpose.*" *Wagner v. City of Garfield*

Heights, Ohio, No. 13-3474, 2014 WL 4067171, at *6 (6th Cir. Aug. 19, 2014) (emphasis added).

These courts—all of which require a free speech litigant to show that a law facially regulates speech *and* was enacted with an illicit purpose to prevail—ignore yet another (slightly modified) adage that this case also proves true: "The pathway to content-based discrimination is paved with good intentions." Indeed, the government nearly always defends laws that discriminate based on content by arguing that it lacks an illicit, or has a benign, motive for the regulation. To excuse content-based discrimination whenever the government has a "good motive"—or is careful enough to mask an illicit motive—would grant the government nearly *carte blanche* authority to drive certain ideas or viewpoints from the marketplace.

This Court should settle the circuit conflict over this paramount question of First Amendment law by reaffirming that (1) once facial content discrimination is found, nothing more is necessary to conclude that a law is content based; (2) a content-based purpose is sufficient but not necessary to prove content-based discrimination, and (3) good regulatory motives cannot exonerate a law that facially regulates speech based on content.[2]

---

[2] As discussed in § I.A., *infra*, while proof of illicit motive is not necessary to prevail on a free speech claim, an illicit motive or purpose can invalidate a law whose text is neutral. *See Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 645 (1994) ("Our cases have recognized that even a regulation neutral on its face may be content based if its manifest purpose is to regulate speech because of the message it conveys."); *cf. Church*

STATEMENT OF THE CASE

A. Statement of Facts

1. Petitioners' Church Invitation Signs

Petitioner Clyde Reed is the Pastor of Good News Community Church. Pet. App. 54a. Good News exists to bring together like-minded Christians who desire to propagate the Christian faith. App. 98-99 ¶ 14. The Church holds services on Sundays, where attendees worship and fellowship together, learn biblical lessons, sing religious songs, pray for their community, and encourage others whenever possible. *Id.* at 99, 104 ¶¶ 15, 42.

Good News' religious convictions mandate that it reach as many people as possible with its religious message. App. 104 ¶ 45. It follows the Great Commission, which is Jesus' command that Christians "go and make disciples of all nations, baptizing them in the name of the Father and of the Son and of the Holy Spirit, and teaching them to obey everything I have commanded you." Pet. App. 4a-5a; App. 104 ¶¶ 43-44. Good News follows this "directive by displaying signs announcing their services as an invitation for those in the community to attend." App. 104 ¶ 47; Pet. App. 5a.

---

of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 535 (1993) ("Apart from the text, the effect of a law in its real operation is strong evidence of its object."). Also, motive or purpose is highly relevant in determining whether the government interest satisfies the applicable level of scrutiny.

The district court correctly ruled that Good News' "signs communicate a religious message" and that they therefore "fall within the category of protected speech." Pet. App. 128a & n.3. Gilbert also admitted that "[Good News'] signs are speech that is protected by the First Amendment." App. 111 ¶ 84; App. 151 ¶ 84. Petitioners' signs typically state the Church's name and the phrase "Your Community Church," provide the Church's website address, phone number, location, and service time, and provide directions. Pet. App. 88a; App. 165.

The Church is very small, averaging between 25-30 adults and 4-10 children per week, Pet. App. 54a, has limited financial means, App. 105 ¶ 50, and has met at various temporary facilities throughout this litigation. At the time Good News filed this case, it met at an elementary school in Gilbert. Pet. App. 87a. In 2008, it moved to a high school just across the Gilbert border in Chandler, Arizona. *Id.* n.1; ER 495 at 6:8-9:10. It currently meets at a senior living center in Gilbert. *See* Good News' website, http://www.goodnewspres.com/location.htm ("We worship at Sunrise Senior Living ... 580 S. Gilbert Road / Gilbert, AZ 85296").

Good News' signs are an essential means by which it invites the public to its services. Pet. App. 54a; App. 105 ¶¶ 50-51. They are inexpensive, require little manpower, and play a critical role in ensuring people know where to find a Church that periodically moves. *Id.* Pastor Reed finds the church invitation signs "very, very effective" based on his "experience over ten years" using them in Gilbert. ER 505 at 47:17-22.

2. Gilbert's Content-Based Sign Code

Gilbert's Code defines "Sign" as "[a] communication device, structure, or fixture that incorporates graphics, symbols, written copy, and/or lighting," App. 58, and "Temporary Sign" as a "sign not permanently attached to the ground, a wall or building, and not designed or intended for permanent display," *id.* at 70. The Code mandates a permit for all signs, but then exempts certain signs from this requirement. *Id.* at 27-30.

Several of these exemptions define the exempted signs based on content. *Id.* It is through these content-based categories of signs that Gilbert regulates a sign's size, duration, number, location, whether it must relate to an event occurring within the town, and whether it requires a permit. *Id.* at 31-32, 38-39, 84, 89.

Among the Code's relevant categories, and their definitions, both of which are content-based, are the following:

- Political Sign § 4.402(I): "A temporary sign which supports candidates for office or urges action on any other matter on the ballot of primary, general and special elections relating to any national, state or local election." App. 68.

- Ideological Sign § 4.402(J): "[A] sign communicating a message or ideas for non-commercial purposes that is not a Construction Sign, Directional Sign, Temporary Directional Sign Relating to a Qualifying Event, Political Sign,

Garage Sale Sign, or a sign owned or required by a governmental agency." App. 66-67 (italics omitted).

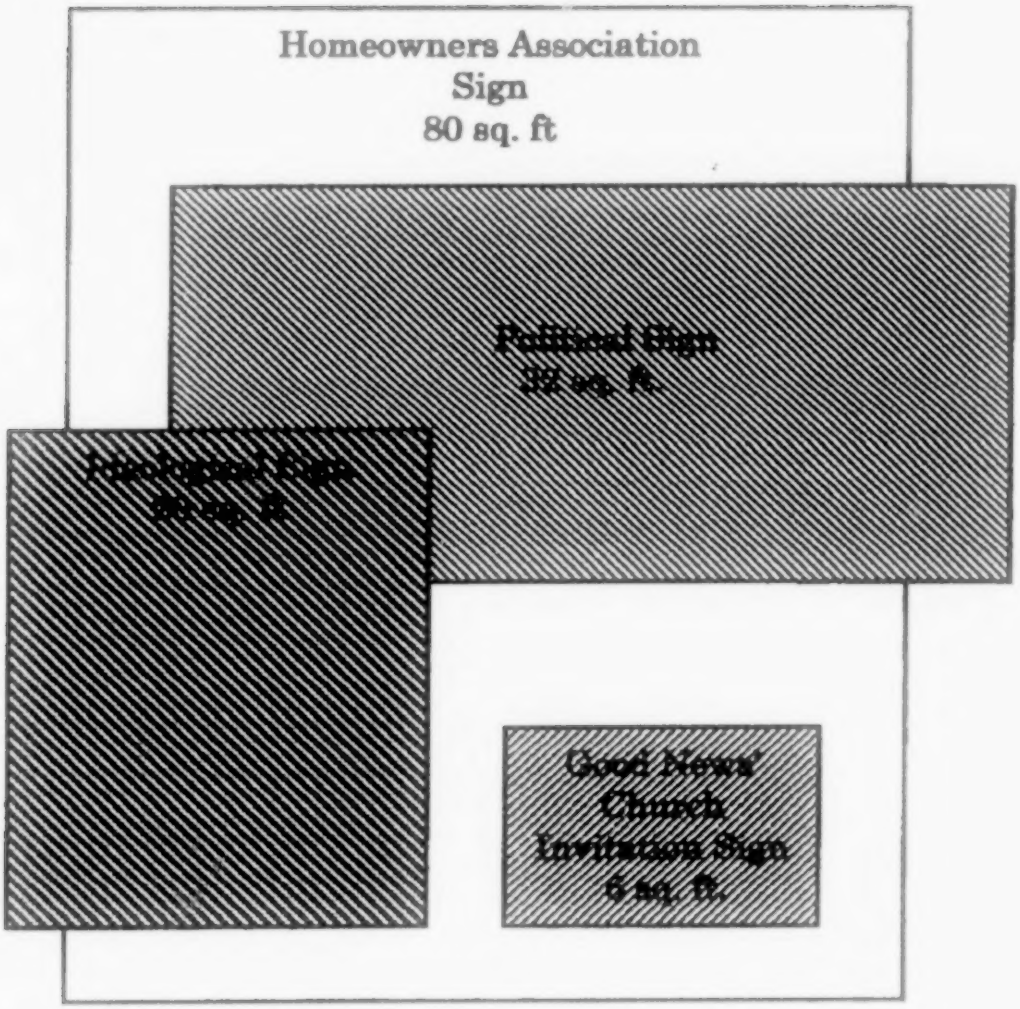
- Qualifying Event Sign § 4.402(P): "[A] temporary sign intended to direct pedestrians, motorists, and other passersby to a 'qualifying event.' A 'qualifying event' is any assembly, gathering, activity, or meeting sponsored, arranged, or promoted by a religious, charitable, community service, educational, or other similar non-profit organization." App. 70 (italics omitted).

- Homeowners Association ("HOA") Facilities Temporary Sign § 4.406(C)(4): "Banners and Directional Signs ... that display information concerning seasonal or temporary events occurring in the development." App. 54.

- Real Estate Sign § 4.405(B)(2): "A temporary sign advertising the sale, transfer, lease, or exchange of real property." App. 69.

Since the very outset of this case, Gilbert has classified Petitioners' signs promoting their church services as temporary, Qualifying Event Signs and applied §4.402(P) of the Sign Code. App. 123 (Notice of Code violation); Pet. App. 117a.

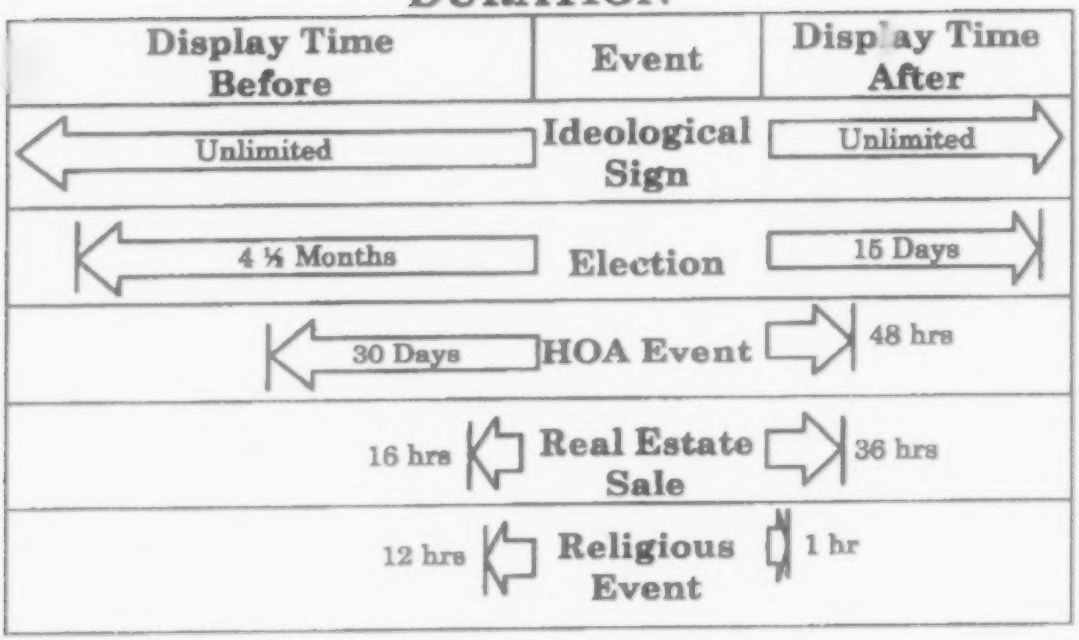
The Code applies different size limitations according to the content-based category into which a sign is placed. The following diagram, which is drawn to scale, depicts this differential treatment:



App. 31-32, 38, 54.

The Code also applies different duration limits according to the content-based category into which officials place a sign. Consider the following diagram, which demonstrates the Code's application to five signs that relate to Saturday events that begin at 8:00 a.m., each lasting 12 hours: (1) an ideological sign commenting on any of the events, (2) a polling station open for an election with a primary, (3) an HOA's community festival, (4) a weekend real estate sale, and (5) a religious event hosted by a church:

DURATION



App. 32, 38, 52, 54-55, 84, 93.

The Code also regulates location, whether a sign must relate to a Gilbert event, number, and permit requirements based on a sign's content. The following table sets out this differential treatment:

	Right of Way	*Gilbert Event Only*	*Number*	*Permit*
Political	Yes	No	Unlimited	No
Ideological	Yes	No	Unlimited	No
Qualifying Event	Yes, but Gilbert events only	Yes	Four per property	No
HOA	Yes	Yes (indirectly)	Up to 80 sq. ft. total	Yes
Real Estate	Yes	Yes (indirectly)	15	Yes

App. 31-32, 38-39, 52-55, 84, 89.

Gilbert asserts two interests to justify its differential treatment of temporary signs based on the content-based category into which officials place them: "safety and aesthetics." App. 100 ¶ 24; App. 139 ¶ 24.

There are severe repercussions for violating Gilbert's Code. The penalties "range from a notice of violation to substantial fines and time in jail." ER 169 ¶ 28; ER 156 ¶ 28. *See also* ER 305 at 20:12-21:1 (confirming penalties of fines and possible jail time).

3. Gilbert's Content-Based Regulation of Signs Has Persisted Throughout this Litigation

Gilbert's content-based regulation of Good News' church invitation signs began in 2005 and continues unabated. At that time, Good News placed its signs early on Saturday and removed them several hours after services on Sunday. App. 105 ¶ 54.

In July and September 2005, Gilbert enforced its Code against Good News' signs, both times citing the Church for exceeding the time limit for displaying its signs pursuant to § 4.402(P). Pet. App. 117a; App. 123-26. Gilbert officials confiscated one of Good News' signs, which Pastor Reed had to retrieve from the town offices. ER 514 at 82:24-83:11. After these enforcement actions, Good News reduced the number and duration of its signs to avoid further enforcement. App. 106 ¶ 58.

Because placing more signs for longer periods of time would allow Good News to invite more people to church, App. 106 ¶ 59, Pastor Reed contacted Gilbert's "Code Compliance Department to try to reach some sort of accommodation" in February 2007. Pet. App. 117a. But the "Code Compliance Manager told Good News 'that there is no leniency under the Code, and that the Church would be cited if it was determined that it had violated any of the applicable provisions in the Code.'" *Id.* at 90a.

Good News filed suit one month later, App. 1, challenging the Code, *inter alia*, as a content-based regulation of speech both "on its face and as applied" to the Church's signs. Verified Complaint 8 ¶ 67, Case No. 2:07-cv-00522-SRB, Doc. 1. At that time, § 4.402(P) of the Code applied solely to "Religious Assembly Temporary Directional Signs." *Id.* at 3-4 ¶ 21. But, it contained the same content-based categories (*i.e.*, Political Signs, Ideological Signs, HOA Signs, etc.) that exist on the face of the Code today. *Id.* ¶¶ 18-24. Also like the present Code, it treated signs placed in those categories far better in relation to their size, duration, location, and number, than Good News' church invitation signs. *Id.*

Shortly after this suit was filed, Gilbert stipulated to a preliminary injunction against § 4.402(P) and set out to amend its Code. App. 1-2. It passed an amendment in January 2008, App. 73-79, which left intact each content-based aspect of the Code Good News initially challenged. In sum, the amendment (1) slightly increased the height of Good News' signs to 6 feet but retained their 6 square foot area requirement, App. 76; (2) slightly increased the

duration limit on Good News' signs from 2 to 12 hours before an event, *id.*; and (3) changed § 4.402(P)'s name from "Religious Assembly Temporary Directional Signs" to "Temporary Directional Signs Relating To A Qualifying Event" and added a new definition to the Code's Glossary (which is set out above) for the latter signs. *Id.* at 75, 77-78. This change subjected some additional nonprofit groups' signs advertising meetings, events, and activities to § 4.402(P)'s onerous restrictions. *Id.*

Gilbert amended the Code yet again in 2011, while the case was on appeal to the Ninth Circuit. App. 80-94. This amendment not only left intact all of the content-based restrictions Good News initially challenged, but expanded upon them by exchanging the ban on Qualifying Event Signs being placed in the right of way for a requirement that they relate to events in Gilbert. App. 89. The "Gilbert-events-only" requirement only applies to Qualifying Event Signs. Thus, a church cannot place signs in rights-of-way advertising events occurring outside of Gilbert, but political and ideological signs that do not relate to Gilbert events may be placed freely within rights-of-way. App. 31-32. Gilbert conceded, for example, that Political Signs have no in-town "situs," Defs.' Ans. Br. 31, 9th Cir. Case No. 11-15588, Doc. 13, yet they are liberally permitted in rights-of-way.

Further, it is plain that Gilbert again targeted Good News with the Gilbert-events-only limitation. The Church had moved its services (several years before) a few blocks across the Gilbert border to a school located in Chandler, Arizona. Pet. App. 87a n.1. Thus, even though Gilbert removed the bar on

placing Qualifying Event Signs in rights-of-way, the Gilbert-events-only limitation prohibited Good News from placing *any* signs there. *Id.* at 20a (finding that the Gilbert-events-only requirement "bars Good News from erecting any [church] signs at all.").[3] This bar lasted from the time the 2011 amendment took effect until the Church's November 2013 move back to Gilbert. App. 89. Although the church currently meets in temporary facilities in Gilbert, there is a strong likelihood in the near future that it will move its meeting location just across Gilbert's border and be barred once again from placing signs in Gilbert.[4]

---

[3] The Ninth Circuit stated that it was unwilling to rule on the Gilbert-events-only restriction based on its conclusion that it is "different in nature" from the content-based size, duration, number, and other limitations Good News challenges. Pet. App. 44a. But this is plainly incorrect. Gilbert imposed and enforces the Gilbert-events-only requirement through the same content-based mechanism it imposed and enforces the other limits Good News challenges: the Code's content-based categorization of temporary signs. It is thus not "different in nature," but more of the same content-based discrimination that has plagued the Code since the inception of this lawsuit.

[4] It is noteworthy that Gilbert also borders other large suburbs in the East Valley outside the Phoenix Metro area, such as Chandler and Mesa. *See* Defs.' Answering Br. 8, Case No. 11-15588, Doc. 13. As in many suburban communities across the country, the border between Gilbert and Chandler is porous. Nothing distinguishes when someone leaves one town and enters the other. Good News' facility-rental experience highlights this fact. Prior to moving to a school located in Chandler, Good News met at a school that was physically located in Gilbert but part of the Chandler Unified School District. Aff. of Pastor Clyde Reed 1 ¶ 5, attached to Appellants' Letter Br., Case No. 08-17384, Doc. 32.

B. Procedural Background

Good News filed this 42 U.S.C. § 1983 lawsuit against Gilbert in March 2007, seeking declaratory and injunctive relief and nominal damages. App. 1. Shortly after Gilbert amended its Code on January 8, 2008, *id.* at 73-79, Good News filed an amended verified complaint challenging Gilbert's original and amended Codes "facially and as applied," requesting injunctive and declaratory relief and nominal damages, *id.* at 1113 ¶ 97, 120. Good News also filed a second motion for preliminary injunction, *id.* at 3, which the district court denied, Pet. App. 140a.

The Ninth Circuit affirmed the lower court without reaching Good News' primary claim, *i.e.*, that Gilbert's Code impermissibly makes content-based distinctions among noncommercial signs. Pet. App. 45a-46a. It remanded for consideration of that question, *id.* at 115a, and also observed that "Gilbert has adopted a sign ordinance that makes one's head spin to figure out the bounds of its restrictions and exemptions," *id.* at 95a.

On remand, the parties agreed to resolve all remaining issues on summary judgment. Pet. App. 56a. After discovery, the parties filed cross-motions for summary judgment. App. 9-10. On February 11, 2011, the court entered an order granting Gilbert's motion, and denying Good News'. Pet. App. 83a-84a.

The Church timely appealed to the Ninth Circuit. App. 14. In a 2-1 opinion, the court affirmed the lower court's summary judgment decision in Gilbert's favor on Good News' free speech

claim. Pet. App. 44a-45a. The majority excused the Code's facial content-based distinctions among temporary signs based on its conclusion that "Gilbert did not adopt its regulation of speech because it disagreed with the message conveyed" and because "Gilbert's interests in regulat[ing] temporary signs are unrelated to the content of the sign." *Id.* at 31a-32a. The majority also found that Gilbert's Code made permissible speaker- and event- based distinctions among noncommercial signs.

Notably, the majority also credited Gilbert's argument that political and ideological signs have more First Amendment value than Good News' church invitation signs. *Id.* at 24a-26a.

Judge Watford dissented. He concluded that "Gilbert's sign ordinance violates the First and Fourteenth Amendments by drawing content-based distinctions among different categories of non-commercial speech." Pet. App. 49a. He observed that "the most glaring illustration" of these content-based distinctions is "the ordinance's favorable treatment of 'political' and 'ideological' signs relative to the treatment accorded the non-commercial signs [Good News] seek[s] to display." *Id.*

Judge Watford noted that the only justification Gilbert offered for its unequal treatment of these similar signs is its "apparent determination that 'ideological' and 'political' speech is categorically more valuable, and therefore entitled to greater protection from regulation, than speech promoting events sponsored by non-profit organizations." Pet. App. 51a. The First and Fourteenth Amendments,

Judge Watford stressed, forbid Gilbert from making that kind of "value judgment." *Id.*

The Ninth Circuit denied a timely petition for rehearing en banc. Pet. App. 141a. This appeal followed.

SUMMARY OF ARGUMENT

Content neutrality is an objective test. Under that test, laws that facially classify speech based on content are content based. There is no need for a free speech litigant to also prove a content-based purpose to prevail. Moreover, the government cannot exonerate its content-based discrimination by the mere assertion of a content-neutral purpose.

Gilbert's Sign Code fails the objective content-neutrality test. It divides temporary signs into content-based categories and then regulates various aspects of those signs based on the category into which Gilbert officials place them. Similar speech regulations have been found content based, subjected to strict scrutiny, and struck down by this Court.

None of the explanations supplied by the lower court can save Gilbert's content-based regulation of signs. First, the Code is not speaker-based because it treats signs differently based on what they say, not on who is speaking. Further, speaker-based laws are constitutionally suspect, so even if the Code were speaker-based it would still violate the First Amendment.

Second, the Code is not event-based. It regulates signs through content, not event, classifications. Moreover, the Code's content-based classifications treat signs related to events differently based on what they say.

Third, the lower court's approach of determining whether signs are "related and competing" before applying First Amendment protections is fundamentally flawed. It expressly allows municipalities to classify speech into content-based categories based on the rationale that all competing views receive the same treatment. This improperly reduces concerns over content neutrality to a ban on viewpoint discrimination. Further, contrary to the lower court's finding, Qualifying Event, Political, and Ideological Signs *are* related and compete in relation to their primary purpose, *i.e.*, advertising, and Gilbert improperly distinguishes among these signs based on content.

While this Court has repeatedly held that the lack of an illicit, or presence of a benign, motive cannot save a facially content-based law, the lower court nonetheless found that Gilbert lacked an illicit motive and thus concluded the Code was content neutral. This was plain error. In fact, lower courts' confusion over the role of motive in the content neutrality test led to the circuit conflict that prompted this Court to grant certiorari. This case presents an important opportunity for the Court to clarify this critical area of First Amendment jurisprudence by reaffirming that content neutrality is foremost an objective, not subjective, test.

Gilbert's Code is also content based because enforcement officials must examine what a temporary sign says before they can determine which provision of the Code to apply. Gilbert officials testified that they must categorize a sign to enforce the Code and that they do so by determining the sign's message. Moreover, the Code's content-based classifications invariably result in unbridled discretion problems, as officials may disagree about how to classify signs, sign placers do not know what speech the Code prohibits, and the Code restricts both far too little and too much speech than necessary to achieve its goals.

The lower court tried to sidestep these fatal flaws inherent in Gilbert's Code by claiming that it is not improper to look at the content of speech to determine whether *the manner* of communication is covered by a particular rule of law. But Gilbert's Code mandates examination of the content of the same manner of expression, signs. Thus, this rule has no application to this case.

Gilbert's content-based discrimination is evident in yet another way: the town candidly admits that it grants Political and Ideological Signs better treatment than Good News' signs because it views political and ideological speech as having more value than Good News' religious speech. Surprisingly, the lower court credited these arguments. Regulating speech based on these types of judgments concerning the relative value of different categories of noncommercial speech is forbidden by the First Amendment.

Gilbert's Sign Code is thus content based and subject to strict scrutiny, a standard it cannot satisfy. The Code's drastic underinclusiveness severely undercuts Gilbert's ability to demonstrate either a compelling interest or narrow tailoring. Indeed, the Code regulates signs in the name of safety and aesthetics, yet grants highly favorable treatment to several types of temporary signs, including political signs, which pose the greatest threat to its interests. Yet at the same time the Code is overinclusive in that it imposes strict limits on Good News' signs. Gilbert cannot claim its interests are compelling when it permits such wide ranging damage to them. Nor can it claim its Code is narrowly tailored, since the selective, content-based distinctions it makes among signs have no relation whatsoever to its asserted interests.

ARGUMENT

I. Content Neutrality Is Determined Based on a Regulation's Plain Text.

The standard for gauging a law's content neutrality is objective. Thus, if a law facially classifies speech based on content, that is sufficient to prove it is content based. The government's subjective purpose can help prove such a law is content based, but it is not necessary to such a showing. And, crucially, this Court has repeatedly rejected the idea that the government can save a facially discriminatory law by asserting a content-neutral motive or purpose.

Just last Term, this Court reaffirmed that "the guiding First Amendment principle" in judging content neutrality is that the "government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *McCullen v. Coakley*, 134 S. Ct. 2518, 2529 (2014) (quoting *Police Department of City of Chicago v. Mosley*, 408 U.S. 92, 95 (1972)); *see also Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 643 (1994) ("As a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based."). Succinctly put, "[W]hether a statute is content neutral or content based is something that can be determined on the face of it; if the statute describes speech by content then it is content based." *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 448 (2002) (Kennedy, J., concurring).

This has been the Court's consistent approach to determining content neutrality for decades. *See McCullen*, 134 S. Ct. at 2531 (finding law content neutral because it did "not draw content-based distinctions on its face"); *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2663 (2011) (law content based where "[o]n its face [it] enact[ed] content- and speaker-based restrictions on the sale, disclosure, and use of prescriber-identifying information"); *United States v. Playboy Entm't Grp.*, 529 U.S. 803, 811 (2000) (law imposing additional burdens on cable television operators who provide channels primarily dedicated "to sexually explicit adult programming or other programming that is indecent" content based); *Burson v. Freeman*, 504 U.S. 191, 197 (1992) (law barring solicitation of votes

and display or distribution of campaign material within 100 feet of polling places content based); *Regan v. Time, Inc.*, 468 U.S. 641, 647-48 (1984) (law that imposed ban on photographic reproductions of American currency except for depictions that served a "philatelic, numismatic, educational, historical, or newsworthy purpose[]" content based); *Widmar v. Vincent*, 454 U.S. 263, 265 (1981) (university policy barring student groups from engaging in "religious worship or religious teaching" content based); *Carey v. Brown*, 447 U.S. 455, 458-59 (1980) (law that "on its face" exempted labor disputes from ban on residential picketing content based).

Importantly, once facial content discrimination is found, nothing more is required to conclude that a law is content based. There is no need to search for a content-based motive or purpose. *See Turner*, 512 U.S. at 642 ("[W]hile a content-based purpose may be *sufficient* in certain circumstances to show that a regulation is content based, it is not *necessary*") (emphasis added).

Further, and critically for deciding the question presented in this case, neither the lack of illicit motive, nor a professed altruistic motive, can save a law that is content based on its face. As this Court stated in *Turner*, 512 U.S. at 642-43, "the mere assertion of a content-neutral purpose" will not "be enough to save a law which, on its face, discriminates based on content."

Purpose or motive thus rarely play a role when this Court determines whether a law is content based on its face. And when it does, it is a one-way

ratchet: purpose can only condemn a law as content based, it generally cannot save one that facially regulates speech based on its content.

II. Gilbert's Code Fails the Content Neutrality Test.

A. Gilbert's Sign Code Draws Content-Based Distinctions on its Face and As-Applied Treats Good News' Signs Far Worse than Similar Signs.

1. Gilbert's content-based approach to regulating signs is evident from the face of its Sign Code. The Ninth Circuit put its thumb precisely on this constitutional defect (even though it wrongly concluded the Code was content neutral), observing that "Ideological Signs, Political Signs, and Qualifying Event Signs are all exempted from the Sign Code's permit requirement" yet "each category faces different restrictions and requirements." Pet. App. 115a.[5]

---

[5] The Ninth Circuit oddly stated that Good News did not mount a facial challenge to Gilbert's Sign Code, that it made "basically" an as-applied challenge, Pet. App. 8a, and that Good News had "not really challenged" this errant conclusion, *id.* at 43a. But the record shows that the Church has consistently pursued facial and as-applied challenges throughout this litigation. In its Amended Complaint, the Church repeatedly alleged that the Code is invalid on its face and as applied, App. 113 ¶ 97, 114 ¶ 105, 116 ¶ 121, 119 ¶ 138, and its Prayer for Relief sought an order striking down the Code "facially and as applied," App. 120. The questions presented in the Church's opening briefs both times the case was before the Ninth Circuit sought review of its facial and as-applied claims. Appellants' Opening Brief 2-3, 9th Cir. Case 08-17384, Doc. 10 (asking whether the Code is "content-based facially" and "as-applied" to

Indeed, the Code classifies temporary signs based on their content. *See* Statement of Facts § 2, *supra* (setting forth Code's definitions for Political, Ideological, Qualifying Event and other signs). After categorizing signs in this manner, the Code imposes widely different size, duration, location, number, and other requirements that correspond to the content-based category into which officials pigeonhole each sign. And Gilbert has placed Good News' church invitation signs in the Qualifying Event Sign category, which results in its signs receiving far worse treatment than similar, noncommercial signs.[6]

Good News' signs); Appellants' Opening Br. 4, 9th Cir. Case No. 11-15588, Doc. 6 (noting the many content-based problems with the code and asking "*[i]s the Code content-based on its face and as applied* to the Plaintiffs' religious signs in violation of the Free Speech Clause?") (emphasis added). And, of course, Good News dedicated much of the appellate briefing to its facial claim. Thus, there is no question that Good News' facial claim is squarely before this Court.

[6] Respondents claim that "Petitioners have argued that their off-site signs are 'temporary directional signs' under § 4.402P." Opp. 2. This is not the case. The record shows that Gilbert classified the Church's signs the very first time it enforced the Code. App. 123-126 (noting violations of "4.402 P"). Moreover, Good News has consistently asserted that its signs are religious speech entitled to full First Amendment protection. *See* Pet. 12; *see also* App. 128a & n.3 ("It is beyond dispute that [the Church's] signs communicate a religious message" and that they therefore "fall within the category of protected speech."). Good News has argued that all signs serve the overarching purpose of communicating a particular message or idea, and that signs serve multiple purposes. For example, Good News' signs communicate a religious message (an invitation to attend church), an ideological message (*i.e.*, "Your Community Church"), and provide some directional information.

This is clear-cut content-based discrimination. In *Mosley*, for example, the city banned all picketing within 150 feet of schools in session, yet exempted pickets involving school labor disputes. 408 U.S. at 93. The Court held that the "central problem" with the ordinance was that it "describe[d] permissible picketing in terms of its subject matter," and that it made the "operative distinction" between lawful and unlawful picketing "the message on a picket sign." *Id.* at 95. Put simply, the ordinance was content based because it regulated protected expression "by classifications formulated in terms of [its] subject [matter]." *Id.* Gilbert's Code regulates protected expression in precisely the same way by classifying temporary signs based on their subject matter.

City of Cincinnati v. Discovery Network, 507 U.S. 410 (1993), also illustrates why Gilbert's Code is content based. There, the city adopted a ban on newsracks that contained "'commercial handbills', but not 'newspapers.'" *Id.* at 429. This Court quickly dispensed with the city's argument that the ordinance was content neutral: "Under the city's newsrack policy, whether any particular newsrack falls within the ban is determined by the content of the publication resting inside that newsrack. Thus, by any commonsense understanding of the term, the ban in this case is 'content based.'" *Id.*

That Gilbert's Code is content based is just as apparent. In *Discovery Network*, the content of a publication determined whether it could be distributed via newsracks. Under Gilbert's Code, the content of a sign determines its permissible size, duration, location, and other aspects. For instance,

if a sign says "Vote for McCain," it can be 32 square feet, if it says "McCain Should End the War in Afghanistan," it can be 20 square feet, if it says "HOA voting drive this Saturday," it can be 80 square feet, but if it says "Learn Why Voting Matters, Visit Good News Community Church," it can be only 6 square feet. If this does not qualify as content-based discrimination, it is difficult to conceive of something that would.

Indeed, the classifications contained on the face of Gilbert's Code are indistinguishable from many additional laws this Court has struck down as facially content based. *See* § I, *supra*. For example, Vermont's regulation of pharmaceutical speech was content based because "on its face, [it] enact[ed] content- ... based restrictions on the sale, disclosure, and use of prescriber-identifying information." *Sorrell*, 131 S. Ct. at 2663. The federal statute in *Holder v. Humanitarian Law Project*, 561 U.S. 1, 27 (2010), was content based because whether the plaintiffs could speak "depend[ed] on what they sa[id]." If their speech "impart[ed] a 'specific skill' or communicate[d] advice derived from 'specialized knowledge' ... then it [was] barred." *Id.* But if their speech "impart[ed] only general or unspecialized knowledge" it was permitted. *Id.* And in *United States v. Stevens*, 559 U.S. 460, 468 (2010), the Court found that the statute "explicitly regulate[d] expression based on content" because it restricted "photographs, videos, or sound recordings depending on whether they depict[ed] conduct in which a living animal is intentionally harmed."

Like these laws, Gilbert's Code "by [its] terms distinguish[es] favored speech from disfavored speech on the basis of the ideas or views expressed" and thus is "content based." *Turner*, 512 U.S. at 643. It is therefore "presumptively invalid" under the First Amendment and triggers strict scrutiny. *R.A.V. v. City of St. Paul*, 505 U.S 377, 382 (1992).

2. The Ninth Circuit dismissed the content-based classifications that appear on the face of Gilbert's Code by characterizing them as speaker- and event- based exemptions, which the court deemed content neutral. Pet. App. 24a-26a. But the Code is neither speaker- nor event- based; nor would it suffice to save the Code if it were.

A law is speaker-based if it treats a speaker's message the same no matter what the speaker says. That is plainly not how Gilbert's Code operates. For example, a sign supporting a ballot proposition displayed by Good News would ostensibly be governed by the Political Sign provision, while Gilbert has stated that a sign inviting community members to Good News' church services is governed by the Qualifying Event Sign provision. If the Code was speaker-based, both signs would receive the same treatment regardless of what they said.

Furthermore, speaker-based laws are also constitutionally suspect. "Laws designed or intended to suppress or restrict the expression of specific speakers contradict basic First Amendment principles." *Playboy Entm't Grp.*, 529 U.S. at 812; *see also Consol. Edison Co. of N.Y. v. Pub. Serv. Comm'n*, 447 U.S. 530, 533 (1980) (rejecting speaker-

based rationale for restriction because "[t]he inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual."). The First Amendment thus prohibits "restrictions distinguishing among different speakers.... As instruments to censor, these categories are interrelated: *Speech restrictions based on the identity of the speaker are all too often simply a means to control content.*" *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 340 (2010) (citations omitted and emphasis added). Gilbert's Code is not speaker-based, but if it were it would still violate the First Amendment.

Gilbert's Code also is not event-based. The Code accords different treatment to signs depending on whether they "support[] candidates for office" (Political Sign), promote an "assembly, gathering, activity, or meeting" of certain non-profit organizations (Qualifying Event Sign), advertise an HOA's "seasonal or temporary events" (HOA Sign), or "communicat[e] a message or ideas for non-commercial purposes" so long as the message does not, *inter alia*, support a candidate or promote a non-profit event (Ideological Sign). These are content-based, not "event-based," classifications.

Nonetheless, wrongly interpreting the Code as "event-based" does not render it content neutral because the Code makes content-based distinctions among signs that relate to events. For example, the district court found that "[b]oth Political Signs and Qualifying Event Signs relate ... to events—an

election or a specified event fitting the definition in the Sign Code." Pet. App. 73a; *see also* Defs.' Ans. Br. 40, 9th Cir. Case No. 11-15588, Doc. 13 (asserting that "[t]emporary signs relating to a political candidate or ballot measure are tied to the *event of a public election.*") (emphasis added). Yet these "event-based" signs receive vastly different treatment under the Code solely because of what they say. In fact, both sign types relate to one-day events—political signs to an election and the Church's signs to their Sunday worship service—yet political signs are treated far better than Good News' signs in relation to their size, duration, and several other aspects.[7] The same holds true for HOA signs. They typically relate to one day events (for example, a summer block party) yet they can be far larger and displayed far longer than Good News' church service signs.

Because the "operative distinction" the Code makes between event-based signs is "the message" that appears on them, recasting the Code as event-based does not save it. *Mosley*, 408 U.S. at 95. Rather, it further illustrates just how deeply content-based discrimination is embedded within Gilbert's Code.

---

[7] For this reason, even standing alone § 4.402(P) is not content neutral, despite the Ninth Circuit's holding to the contrary. Political nonprofits posting signs about candidate elections or ballot issues receive far more favorable treatment under the Code's Political Signs provision than do Good News and other non-political (and thus disfavored) nonprofits under the Qualifying Event Sign provision.

Gilbert's Code is neither speaker-based nor event-based. Here, those labels are just euphemisms for content-based discrimination.

3. The Ninth Circuit also opined that Gilbert's Code does not regulate Qualifying Event, Political, and Ideological Signs based on their content because it concluded that these signs are "not in competition" and are "unrelated." Pet. App. 33a-34a.

There are numerous problems with this conclusion, two of which are highlighted here. First, the court cited no authority that allows courts to determine whether speech is "in competition" or "related" before applying First Amendment protections.

It is not the province of municipalities to determine when noncommercial speech is "related" or "competing." Such an approach would inexorably lead to speech being arbitrarily classified into narrowly defined subjects. Indeed, here the Ninth Circuit applied its novel "related and competing" rule and found no constitutional problem with Gilbert regulating Political and Ideological Signs more favorably than Qualifying Event Signs because all signs placed *within* these content-based categories receive the same treatment regardless of their viewpoint. Pet. App. 26a (observing that "it makes no difference which candidate is supported, who sponsors the event, or what ideological perspective is asserted"). The Ninth Circuit's approach thus improperly relegates content neutrality to a concern over viewpoint discrimination alone. *See Consol. Edison Co.*, 447 U.S. at 537 ("The

First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to" regulations that "restrict expression because of its message, its ideas, its subject matter, or its content.").[8]

Second, the Ninth Circuit's determination that Political, Ideological, and Qualifying Event Signs are unrelated and do not compete is simply inaccurate. These signs (and all other noncommercial signs permitted under the Code) compete and are related because they all *advertise*. The purpose of all signs is to advertise. "Advertise" means "to make the public aware of something" and "to make a public announcement ... about something that is wanted or available." *Merriam-Webster Unabridged Dictionary Online*, *available at* http://www.merriam-webster.com/dictionary/advertise (last visited September 11, 2014).

Here, each category of sign seeks "to make the public aware of something" and "to make a public announcement ... about something that is wanted or available." *See* ER 307 at 28:24-29:5 (admitting that "the purpose" of every sign "is to communicate a message or idea"). Political Signs, such as "Hilary

---

[8] Like the law in *R.A.V. v. City of St. Paul*, 505 U.S 377, 391 (1992), Gilbert's Code "goes even beyond mere content discrimination, to actual viewpoint discrimination." Indeed, an atheist group could indefinitely post a 20 square foot sign that says "Don't Waste Your Time On Superstition, Skip Good News' Services This Sunday" right next to Good News' 6 square foot church invitation sign that could only be displayed for a handful of hours. This opposing viewpoint would receive far better treatment under the Ideological Sign provision.

for President," promote the named candidate. An Ideological Sign, like "Stop Illegal Immigration," calls public attention to an ideological position. And HOA Signs promote "seasonal or temporary events," like a weekend festival or a Christmas party. Similarly, Good News' signs "make the public aware of" its church services.

Gilbert's sole basis for distinguishing among these signs—all of which are related and competing for public notice—is their content. This is a distinction that the First Amendment forbids Gilbert from making.

B. Lack of Illicit Motive Cannot Save a Content-Based Regulation.

This Court has consistently rejected the argument that a lack of illicit motive, or an alleged pure motive, can save a facially content-based law. In *Discovery Network*, the city claimed that its regulation permitting newsracks holding newspapers, but barring those containing commercial publications, was content neutral because its justification for the regulation—concerns over safety and aesthetics—was content neutral. 507 U.S. at 429. But this Court rejected the city's argument that "the test for whether a regulation is content based turns on the 'justification' for the regulation." *Id.* Rather, it stressed the ordinance's plain text, noting that "the very basis for the regulation is the difference in content between ordinary newspapers and commercial speech." *Id.* And, critically, it flatly refused to consider the city's alleged motive in deciding the content neutrality

question: "True, there is no evidence that the city has acted with animus toward the ideas contained within [commercial publications], but just last Term we expressly rejected the argument that 'discriminatory ... treatment is suspect under the First Amendment only when the legislature intends to suppress certain ideas.'" *Id.* (quoting *Simon & Schuster v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 117 (1991)).

This Court has repeatedly reaffirmed this principle. *See* § I, *supra*; *see also Ark. Writers' Project v. Ragland*, 481 U.S. 221, 228 (1987) (content-based "discrimination can be established even where ... there is no evidence of an improper censorial motive."); *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 592 (1983) ("Illicit legislative intent is not the *sine qua non* of a violation of the First Amendment."); *NAACP v. Button*, 371 U.S. 415, 438-39 (1963) ("[I]t is no answer to the constitutional claims asserted by petitioner to say ... that the purpose of these regulations was merely to insure high professional standards and not to curtail free expression.").[9]

---

[9] Gilbert has advanced the argument throughout this litigation that Good News must prove illicit motive. Defs.' Resp. to Pls.' Second Mot. for Prelim. Inj. 6, Case No. 2:07-cv-00522, Doc. 30 (asserting that "one must show evidence of an illicit motive or desire to stifle certain viewpoints to support a content-based challenge"); Defs.' Answering Br. 15, Case No. 08-17384, Doc. 13 (arguing that Good News must offer "evidence suggesting illicit motive by [Gilbert] in enacting" the Qualifying Event Sign provision to prevail).

Despite this Court's precedent, the Ninth Circuit took motive into account, finding that "Gilbert did not adopt its regulation of speech because it disagreed with the message conveyed." Pet. App. 31a. It also observed that "Gilbert's interests in regulat[ing] temporary signs are unrelated to the content of the sign." *Id.* at 32a. These irrelevant (and inaccurate[10]) assertions played a pivotal role in the court's errant conclusion that Gilbert's Code is content neutral.

This same error has led some courts of appeals to find facially content-based sign codes content neutral. *See, e.g., Brown v. Town of Cary*, 706 F.3d 294, 301 (4th Cir. 2013) (content-based numeric and size limitations excused based on finding that the government "may distinguish speech based on its content so long as its reasons for doing so are not based on the message conveyed."); *H.D.V.-Greektown, LLC v. City of Detroit*, 568 F.3d 609, 621

---

[10] This is one of the rare cases where the one-way ratchet of government intent, *see* § I, *supra*, *confirms* the content-based discrimination that appears on the face of Gilbert's Code. Gilbert has been targeting the Church's signs for discriminatory treatment since before this lawsuit commenced and has perpetuated that discrimination through its amendments to the Sign Code. *See* Statement of Facts § 3, *supra*. As Petitioners argued in the court below, the 2011 amendment "target[s] Good News for disfavored treatment by proposing yet another restriction on Good News' signs—that they must promote events within the Town—that it does not impose on Political, Ideological, and other signs." *See* Appellants' Reply Br. 9 n.3, Case No. 11-15588, Doc. 17. Moreover, Gilbert candidly admits that it treats certain noncommercial, temporary signs better than Good News' church signs because it views those signs as having more value than Good News' signs. *See* § I.D., *infra*.

(6th Cir. 2009) (content-based height regulations excused based on finding that they were "not adopted because of disagreement with the message the speech conveys").

Yet other courts follow this Court's objective content neutrality test and have arrived at the opposite conclusion concerning similar sign codes. *See, e.g., Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250, 1255-58 (11th Cir. 2005) (content-based exemptions from permit requirement found content based despite benign motive defense); *Neighborhood Enters., Inc. v. City of St. Louis*, 644 F.3d 728, 737 (8th Cir. 2011) (content-based exemptions from limitations imposed on signs found content based because the code made "impermissible distinctions based *solely* on the content or message conveyed by the sign.").

This circuit conflict encapsulates the issue in this case. At the certiorari stage, several First Amendment scholars identified "occasional remarks" about message hostility in *Hill v. Colorado*, 530 U.S. 703 (2000), and *Ward v. Rock Against Racism*, 491 U.S. 781 (1989)), as the source of this conflict in the sign code context. Professor's Br. 10. *See, e.g., Hill*, 530 U.S. at 719 ("[T]he principal inquiry in determining content neutrality ... is whether the government has adopted a regulation of speech because of disagreement with the message it conveys.") (quoting *Ward*, 491 U.S. at 791). The Professors observed that courts of appeals are mistakenly relying on these infrequent comments to "call[] content-neutral that which is indubitably content-based." Professors' Br. 10. Indeed, the

lower court erred when it relied on precisely these statements from *Hill* and *Ward* to find Gilbert's indubitably content-based Code content neutral. Pet. App. 29a-30a.

This case thus presents an important opportunity for this Court to clarify *Hill* and *Ward* and to reaffirm the essential First Amendment principle that a free speech litigant need not prove illicit motive to prevail against a law that facially regulates speech.

C. Gilbert's Code Is Content Based Because Enforcement Officials Must Determine What a Sign Says to Decide What Limitations Apply.

1. Just last term, this Court reaffirmed that a regulation of speech is "content based if it require[s] 'enforcement authorities' to 'examine the content of the message that is conveyed to determine whether' a violation has occurred." *McCullen*, 134 S. Ct. at 2531. That principle has long been recognized in First Amendment law. *See F.C.C. v. League of Women Voters of California*, 468 U.S. 364, 383 (1984) (holding a ban on editorials related to "controversial issues of public importance" content based because "enforcement authorities must necessarily examine the content of the message that is conveyed to determine whether the views expressed" are banned).

In *McCullen*, a majority of this Court held that the buffer zone statute passed this test because whether persons violated it did not depend on "'what

they say,' but simply on where they say it." 134 S. Ct. at 2531 (citation omitted). In fact, a person could have violated the statute "without displaying a sign or uttering a word." *Id.* But here, the content-based classifications on the face of Gilbert's Code make determining what a sign says essential to its enforcement.

Mike Milillo, Gilbert's senior planner and zoning administrator, whose job responsibilities include interpreting the Sign Code, confirmed this. He testified that Code enforcers have to "figure out how to categorize [each sign]" to determine "which regulations apply." ER 258 at 23:6-7. Code enforcers perform this function by "review[ing] ... each individual sign that comes before [them] to see what the elements are, *what is the message*." ER 257 at 21:21-24 (emphasis added). For example, when asked about the difference between a political and an ideological sign, Mr. Milillo testified that "the definition of the political sign is it's a temporary sign that supports candidates or urges action on different matters that are on the ballot. Ideological signs are ... more general because they can just be messages of ideas for non-commercial purposes." ER 258-59 at 25:21-26:1. In other words, the Code differentiates between Political and Ideological Signs based on what they say. Such distinctions are a natural and necessary result of a Code that regulates signs based on the content-based categories into which officials place them.

Gilbert candidly admits that its Code "treats many different kinds of temporary signs differently." App. 131. The text of Gilbert's Code and its

enforcement official's undisputed testimony confirms that what makes a temporary sign "different" under Gilbert's Code is *what it says*. Consider, for instance, the Code's duration limits. If a sign supports securing the border, it can be displayed indefinitely. App. 32. If a sign supports a candidate who wins a primary, it can be displayed for at least 5 months. *Id.* at 84. If a sign promotes an HOA event, it can be displayed for over 1 month. *Id.* at 54-55. But if a sign invites people to a church's services, it can be displayed for just 14 hours. *Id.* at 38. The only way for an enforcement official to determine whether a sign violates the Code for being displayed too long is to determine what it says. This is content-based discrimination plain and simple.

The Code's content-based classifications also invariably lead to enforcement officials disagreeing on how to categorize the same sign. For example, when asked which part of the Code governs a sign that contains both directions to a church and a political message, Milillo testified that he would treat the sign as a Qualifying Event Sign but that other officials may treat it as a Political Sign:

> [T]here's two different types of messages on it, but it's giving direction to the qualifying event. And so ... if there's a political message on it as well ... it's a judgment call. Now, maybe others on our staff would look at it differently and they might categorize it as political sign.

ER 260 at 30:9-15.

These "judgment calls" would be unnecessary if the Code was silent regarding the content of signs. But its content-based categories instead invite—indeed, necessitate—enforcement officials engaging in unbridled discretion. *See City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 763-64 (1988) ("[W]ithout standards governing the exercise of discretion, a government official may decide who may speak and who may not based upon the content of the speech or viewpoint of the speaker.").

Consider that an Ideological Sign is defined as a sign that "communicat[es] a message or ideas for non-commercial purposes," unless it is a Qualifying Event Sign, Political Sign, or several other types of signs. App. 66. Every noncommercial sign, including the Church's religious signs, "communicat[e] a message or ideas for non-commercial purposes," *see* ER 307 at 28:17-29:5 (admitting that "the purpose" of every sign "is to communicate a message or idea"), and thus qualifies as an Ideological Sign. Yet the Code requires enforcement officials to differentiate among Ideological Signs based on what they say pursuant to content-based definitions that Mr. Milillo conceded officials may disagree on how to enforce. Such unbridled discretion and vagueness is unacceptable when regulating speech protected by the First Amendment.

2. The Ninth Circuit tried to maneuver around the Code's clear content-based discrimination by relying on *Hill v. Colorado*, 530 U.S. 703, 721 (2000), citing its proposition that this Court has "never held, or suggested, that it is improper to look at the

content of an oral or written statement in order to determine whether a rule of law applies to a course of conduct." That is true as far as it goes, which is nowhere near as far as the Ninth Circuit would have it.

According to *Hill*, this examination of speech was limited to determining the manner in which speech was being conveyed—approaching within eight feet of another to engage in protest, counseling, education, or leafleting. *Id.* at 707. A "cursory examination" of speech for the narrow purpose of excluding "pure social or random conversation" from the manner of expression covered by the statute was permissible. *Id.* at 721-22. This examination, according to the Court, was focused on the means, not the subject matter, of the expression. *Id.*

But here, Gilbert's Code regulates the same means or manner of expression—speaking through temporary signage—based solely on content. Thus, unlike in *Hill*, code enforcers examine temporary signs to determine not the manner in which speech is being conveyed but the *subject matter* of the expression, because what signs say determines how they are treated. As Mr. Milillo testified, the purpose of the examination is to determine "the message" of the sign. *See supra.*

The Ninth Circuit's additional statements concerning *Hill* further reveal its confusion stemming from that decision. The court asserted that *Hill* "upheld a statute that clearly distinguished between types of noncommercial speech," Pet. App. 34a, and that it "indicated that not all types of

noncommercial speech need to be treated the same," *id.* at 44a. But *Hill* asserted the opposite, namely that the statute "place[d] no restrictions on—and clearly does not prohibit—either a particular viewpoint or any subject matter that may be discussed by a speaker." 530 U.S. at 723.

Indeed, in *Hill*, this Court said that the content of the speech was irrelevant to enforcement of the statute. Whether that claim was right or wrong, it shows that *Hill* gives no shelter to the town here since, under Gilbert's Code, the content of signs is the *sine qua non* of enforcement.

D. Gilbert's Valuing of Political and Ideological Speech Over Good News' Religious Speech Further Demonstrates the Content-Based Nature of the Code.

Regardless of whether the government more favorably regulates speech it deems valuable, *see Carey*, 447 U.S. at 466; *Regan*, 468 U.S. at 648, or more heavily regulates speech it deems less important, *see Stevens*, 559 U.S. at 470; *Discovery Network*, 507 U.S. at 429, laws that facially distinguish among speech based on these kinds of value judgments are impermissibly content based.

In *Carey*, the State claimed that its interest in "providing special protection for labor protests" justified a law granting such protests a preferential exemption from a ban on residential picketing. 447 U.S. at 466. This Court rejected the State's justification because it "forthrightly presupposes that labor picketing is more deserving of First

Amendment protection than are public protests over other issues." *Id.* Similarly, in *Regan*, a federal statute banned photographic reproductions of U.S. currency but exempted depictions for "philatelic, numismatic, educational, historical, or newsworthy purposes." 468 U.S. at 647. This Court found the statute content based because "one photographic reproduction will be allowed and another disallowed solely because the Government determines that the message being conveyed in the one is newsworthy or educational while the message imparted by the other is not." *Id.* at 648.

On the other hand, in *Stevens* the government argued that it could regulate depictions of animal cruelty because such speech is of low value. It proffered a test under which a court would determine "[w]hether a given category of speech enjoys First Amendment protection [based] upon a categorical balancing of *the value of the speech* against its societal costs." 559 U.S. at 470 (emphasis added). This Court called the government's proposition "startling and dangerous," and flatly refused to follow its "free-floating test for First Amendment coverage." *Id.* So too, in *Discovery Network*, this Court rejected the city's attempt to save an ordinance favoring newsracks holding newspapers over those containing commercial handbills on the basis that "commercial speech has 'low value.'" 507 U.S. at 429.

Gilbert makes the same arguments here. It repeatedly justified the Code's more favorable treatment of political and ideological speech based on its view that such messages are more important

than Good News' speech. Defs.' Ans. Br. 31, 9th Cir. Case No. 11-15588, Doc. 13 (political signs are "core speech concerning the public event of a campaign for public office"); Defs.' Resp. to Pls.' Mot. for Summ. J. 9, Case No. 2:07-cv-00522-SRB, Doc. 104 ("a public election is the very heart of representative government, and the Town has an interest in supporting these public events"); Defs.' Resp. to Pls.' Second Mot. for Prelim. Inj. 12-13, Case No. 2:07-cv-00522-SRB, Doc. 30 (Political Signs "involve core speech that is entitled to the highest form of protection by the Free Speech Clause" and Ideological Signs, "[l]ike political signs, ... concern[] core speech").

The Ninth Circuit wrongly accepted these arguments. It found that the "Political Signs exemption responds to the need for communication about elections" and that the "Ideological Sign exemption recognizes that an individual's right to express his or her opinion is at the core of the First Amendment." Pet. App. 26a. It also observed that Political and Ideological Signs "raise different legal rights and interests that Gilbert has to respect," as compared to Good News' signs. *Id.* at 40a. And it asserted that Gilbert's more favorable treatment of Political and Ideological Signs, as compared to the Church's signs, "reflects a balance between Gilbert's interests and the constitutional interests of the type of sign covered." *Id.* at 38a.

Simply put, the Ninth Circuit deemed Good News' church invitation signs "low value" speech, and political and ideological signs "high value" speech, based on a constitutional-value versus

government-interest balancing test. But deploying these types of balancing tests to make judgments concerning the "value" of protected speech is forbidden under the First Amendment. *See Stevens, supra*; *see also Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 514 (1981) ("Although the city may distinguish between the relative value of different categories of commercial speech, *the city does not have the same range of choice in the area of noncommercial speech to evaluate the strength of, or distinguish between, various communicative interests.*") (emphasis added).

That is particularly true here, where the lower courts found, and Gilbert admitted, that Good News' church invitation signs are religious speech. App. 128a & n.3 ("It is beyond dispute that [Good News'] signs communicate a religious message" and thus "fall within the category of protected speech."); App. 5a (noting that Good News carries out its religious duty to propagate its faith by "display[ing] signs announcing [its] services as an invitation for those in the community to attend"); ER 173 ¶ 56; ER 165 ¶ 56 (admitting that "[Good News'] signs are speech that is protected by the First Amendment"). Because Good News' signs are "private religious speech," they are "as fully protected under the Free Speech Clause as secular private expression," *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995), like the Political and Ideological Signs that Gilbert accords notably more favorable treatment. *See Members of City Council of City of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 816 (1984) (explaining that a sign stating "'Jesus Saves'" is just as worthy of "the fullest possible measure of

constitutional protection" as a sign stating "'Roland Vincent—City Council'").

That Gilbert treats Good News' church invitation signs differently than Ideological Signs yet again drives home the problem with Gilbert's content-based categorization of signs. Good News' signs are religious speech and also meet the Code's definition of an Ideological Sign, *i.e.*, "a sign[] [that] communicat[es] a message or idea for noncommercial purposes." App. 66-67. Yet Gilbert has determined that Good News' Signs are not "Ideological Signs" and on that basis alone accords them far less favorable treatment. This highlights the irrationality of the Code's content-based distinctions, which result in speech equally entitled to full First Amendment protection receiving drastically different treatment.

III. Gilbert's Code Does Not Survive Strict Scrutiny.

Because Gilbert's Code regulates speech based on its content, "it is invalid unless [Gilbert] can demonstrate that it passes strict scrutiny—that is, unless it is justified by a compelling government interest and is narrowly drawn to serve that interest." *Brown v. Entm't Merchants Ass'n*, 131 S. Ct. 2729, 2738 (2011). Strict scrutiny is "the most demanding test known to constitutional law," *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997), and Gilbert's Code utterly fails it.

One crucial stumbling block that prevents Gilbert from satisfying either prong of that test is

the Code's wild underinclusiveness, along with its overinclusiveness. Gilbert severely clamps down on Good News' temporary signs in the name of safety and aesthetics, yet simultaneously grants highly favorable treatment to the temporary signs that are the chief threat to its interests—political signs. And it grants more favorable treatment to other temporary signs that affect its interests to the same extent as Good News' signs. This complete lack of fit between Gilbert's interests and its selective, content-based treatment of signs renders the Code unlawful no matter what level of scrutiny applied.

A. Gilbert's Interests Are Not Compelling.

Gilbert admits that its twin interests in regulating signs are safety and aesthetics. App. 100 ¶ 24; App. 139 ¶ 24. But courts that have addressed these oft-asserted interests have rejected assertions that they are compelling in nature and thus sufficient to justify content-based discrimination among signs. *Nat'l Adver. Co. v. City of Orange*, 861 F.2d 246, 249 (9th Cir. 1988) (interests in "traffic safety and aesthetics" are "substantial" but not "compelling"); *Whitton v. City of Gladstone*, 54 F.3d 1400, 1408 (8th Cir. 1995) ("[A] municipality's asserted interests in traffic safety and aesthetics, while significant, have never been held to be compelling"); *Solantic*, 410 F.3d at 1267 ("aesthetics and traffic safety" are not compelling interests).

Moreover, this Court has often held that laws like Gilbert's, that permit "appreciable damage to th[e] supposedly vital interest" they allegedly serve, cannot be regarded as serving compelling interests.

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 547 (1993) (quotation and alteration omitted). Or, put differently, an interest is not compelling when the government "fails to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort." *Id.* at 546–47.

Entertainment Merchants Association illustrates this principle. California claimed that its content-based law targeting the sale of violent video games to children served its compelling interest in preventing harmful effects on minors. 131 S. Ct. at 2738-39. But it had not restricted other violent materials that risked exposing minors to the same harmful effects, like violent cartoons on television, games rated "appropriate for all ages," and "pictures of guns." *Id.* at 2739-40. This underinclusiveness torpedoed California's argument that its interest was compelling:

> The consequence is that [California's] regulation is wildly underinclusive when judged against its asserted justification, which in our view is alone enough to defeat it. Underinclusiveness raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint.

Id. at 2740.

Underinclusiveness also toppled the state's proffered interest in *Carey*. There, the state argued

that an exemption of labor picketing from its ban on residential picketing served its interest in protecting residential privacy. 447 U.S. at 465. But the state did not offer any explanation, and there was none, for why labor picketing impacted its privacy interest any less than non-labor picketing, thereby justifying its exclusion from the ban. *Id.* The statute's underinclusiveness demonstrated that the government's proffered interest "[wa]s not a transcendent objective." *Id.*

As in the above cases, it is impossible for Gilbert to credibly claim that its Code serves compelling interests given its vast underinclusiveness. Gilbert permits Political Signs—which are rightly regarded as posing the greatest threat to a municipality's interests in safety and aesthetics—to proliferate by granting them highly favorable treatment under the Code. Gilbert does further damage to its compelling-interest argument by granting favorable treatment to other temporary signs, including Ideological, HOA, and Weekend Real Estate Sale Signs. Hence, Gilbert's compelling interest claim is a thin reed that collapses under the weight of the many temporary signs it liberally allows, especially when one considers that those signs implicate its interests to the same extent as, and in some instances far more than, Good News' signs.

B. Gilbert's Code Cannot Satisfy Narrow Tailoring Under Strict or Intermediate Scrutiny.

Gilbert's Code regulates temporary signs that pose identical concerns regarding safety and

aesthetics in vastly different ways based solely on their content. What the Code lacks is any fit whatsoever between its alleged interests and the content-based restrictions it creates. This complete and utter lack of tailoring would fail even intermediate, let alone strict, scrutiny.

This Court has found that laws similar to Gilbert's lacked the necessary tailoring to pass constitutional scrutiny. In *Carey*, the Court held that the state's interest in residential privacy could not justify its exemption of labor picketing from a ban on residential picketing "for the simple reason that nothing in the content-based labor-nonlabor distinction *has any bearing whatsoever on privacy*." 447 U.S. at 465 (emphasis added). All picketing is equally disruptive of residential privacy, *id.*, yet the state permitted some pickets to impair its interests and not others based on content. Similarly, in *Mosley*, the city asserted that its picketing ordinance was justified by its interest in preventing school disruptions. 408 U.S. at 99. The Court found the ordinance, which permitted some picketers to impair its interest and not others based solely on content, was "far from being tailored" because all picketing posed the same risks to the city's purported interest. *Id.* at 100-102.

Gilbert's Code also fails narrow tailoring because it is overinclusive. Indeed, it "abridges the First Amendment rights" of Good News and many other sign placers in pursuit of interests that it allows appreciable damage to from similar signs. *Brown*, 131 S. Ct. at 2742; *see also Carey*, 447 U.S. at 455 (statute barring all picketing except labor picketing

in residential areas overinclusive because it prohibited far more speech than necessary to achieve its purpose). Gilbert's Code severely restricts far more protected speech than necessary to achieve its goal, and thus is impermissibly overinclsive.

The extreme underinclusiveness of Gilbert's Code would fail even the intermediate scrutiny test that applies to content-neutral time, place, and manner regulations.[11] *Discovery Network*, where the Court applied the commercial speech test, which is comparable to intermediate scrutiny, illustrates this fact. The Court found that the city's content-based distinction between commercial and noncommercial newsracks "ha[d] absolutely no bearing" on its asserted interests in safety and aesthetics. *Id.* at 428. Commercial and noncommercial newsracks were "equally unattractive" and "equally responsible for [the safety] problems" the city sought to regulate, yet the city banned one and not the other. *Id.* at 425, 427. For that reason, the city "ha[d] not established the 'fit' between its goals and its chosen means that is required" under even intermediate scrutiny. *Id.* at 428.

---

[11] Intermediate scrutiny only applies to speech regulations that are content neutral. *Consol. Edison Co.*, 447 U.S. at 536 (intermediate scrutiny did not apply to regulation banning bill inserts about controversial issues of public policy because "time, place, and manner regulations must be 'applicable to all speech irrespective of content'" (citation omitted)). Thus, it does not apply to Gilbert's content-based Code, but rather illustrates that Gilbert not only fails strict scrutiny but cannot even pass a lower level of scrutiny.

Gilbert's Code suffers from the exact same lack of tailoring that doomed each of the laws above. All temporary signs equally affect its interests, yet the town picks and chooses which signs are permitted, and which are not, based on content. Like the ordinance in *Discovery Network*, Gilbert's content-based "distinction[s] bear[] no relationship *whatsoever* to the particular interests that the [town] has asserted. It is therefore an impermissible means of responding to [Gilbert's] ... interests." *Id.* at 424.

Gilbert is by no means powerless to regulate noncommercial signage. Indeed, it has broad authority to regulate the physical characteristics of signs in a content-neutral manner, including, for example, treating all temporary signs the same. But Gilbert has failed to steer clear of what the First Amendment says it must avoid: unjustifiably distinguishing among noncommercial signs based on their content.

CONCLUSION

This Court should reverse the judgment of the court of appeals.

Respectfully submitted,

Kevin H. Theriot
Jeremy D. Tedesco
Alliance Defending Freedom
15100 N. 90th Street
Scottsdale, AZ 85260
(480) 444-0020

David A. Cortman
Counsel of Record
Rory T. Gray
Alliance Defending Freedom
1000 Hurricane Shoals Rd. N.E., Ste. D-1100
Lawrenceville, GA 30043
dcortman@alliance defendingfreedom.org
(770) 339-0774

September 15, 2014

RESPONDENT'S BRIEF

RECORD
AND
BRIEFS

No. 13-502

Supreme Court, U.S.
FILED
NOV 14 2014
OFFICE OF THE CLERK

In The
Supreme Court of the United States

PASTOR CLYDE REED; AND GOOD NEWS COMMUNITY CHURCH,

Petitioners,

v.

TOWN OF GILBERT, ARIZONA; AND ADAM ADAMS, IN HIS OFFICIAL CAPACITY AS CODE COMPLIANCE MANAGER,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR RESPONDENTS

PHILIP W. SAVRIN
Counsel of Record
DANA K. MAINE
WILLIAM H. BUECHNER, JR.
FREEMAN MATHIS & GARY, LLP
100 Galleria Parkway
Suite 1600
Atlanta, GA 30339
(770) 818-1405
psavrin@fmglaw.com

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

Library of Congress
Law Library

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	iii
STATEMENT OF THE CASE	1
SUMMARY OF THE ARGUMENT	7
ARGUMENT	10
I. INTERMEDIATE SCRUTINY APPLIES TO SIGN ORDINANCES THAT DO NOT FAVOR OR CENSOR VIEWPOINTS OR IDEAS	10
A. The Core Principle Of Freedom Of Speech Is The Expression Of Ideas	10
B. The Importance Of *Metromedia* In Regulating Noncommercial Speech	12
C. The Content-Neutrality Standard Is An Aid In Identifying Restrictions That Are Subject To Strict Scrutiny	17
II. BECAUSE GILBERT'S ORDINANCE DOES NOT RESTRICT VIEWPOINTS OR IDEAS, IT IS NOT SUBJECT TO STRICT SCRUTINY	22
A. The Temporary Directional Signs Provision Regulates "Directions" To Specified Events, Not "Invitations" To The Public	23
B. The Temporary Directional Signs Provision Does Not Censor Or Favor Viewpoints Or Ideas	27

TABLE OF CONTENTS – Continued

Page

1. Laws that do not favor or censor views or ideas are subject to the intermediate level of scrutiny 27

2. Gilbert's provisions are easily distinguishable from regulations that are subject to strict scrutiny 31

3. A sign ordinance is not subject to strict scrutiny simply because a sign must be read to determine compliance 34

4. Differences between Ideological Signs and Political Signs do not warrant strict scrutiny 36

III. APPLICATION OF THE INTERMEDIATE LEVEL OF SCRUTINY IS NOT BEFORE THE COURT 41

IV. GILBERT'S CODE SATISFIES THE INTERMEDIATE SCRUTINY TEST 45

A. The Distinctions Are Narrowly Tailored To Advance Significant Governmental Interests 48

B. Gilbert Does Not Favor HOA Signs Or Builder Weekend Directional Signs Over Temporary Directional Signs 51

C. Petitioners Have Adequate Alternative Modes Of Communication 52

CONCLUSION 53

TABLE OF AUTHORITIES

Page

CASES

Ark. Writers' Project, Inc. v. Ragland,
481 U.S. 221 (1987) 15, 33

Bd. of Trs. of State Univ. of N.Y.,
492 U.S. 469 (1989) 47

Boos v. Barry,
485 U.S. 312 (1988) 33

Brown v. Entm't Merchs. Ass'n,
131 S. Ct. 2729 (2011) 33

Brown v. Town of Cary,
706 F.3d 294 (4th Cir. 2013) 20

Burson v. Freeman,
504 U.S. 191 (1992) 16, 34

Carey v. Brown,
447 U.S. 455 (1980) 34

Cent. Hudson Gas & Electric Corp. v. Pub. Serv. Comm'n,
447 U.S. 557 (1980) 13, 14, 32, 46

Chandris, Inc. v. Latsis,
515 U.S. 347 (1995) 43

City of Cincinnati v. Discovery Network,
507 U.S. 410 (1993) 32, 41, 46

City of L.A. v. Alameda Books, Inc.,
535 U.S. 425 (2002) 21, 22, 40, 41

City of Ladue v. Gilleo,
512 U.S. 43 (1994) 18

TABLE OF AUTHORITIES – Continued

Page

Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288 (1984) 16, 18

Clear Channel Outdoor, Inc. v. City of L.A., 340 F.3d 810 (9th Cir. 2003) 14

Consol. Edison Co. of N.Y., Inc. v. Pub. Serv. Comm'n, 447 U.S. 530 (1980) 11, 33

FCC v. League of Women Voters of Cal., 468 U.S. 364 (1984) 12, 33

Granite State Outdoor Advertising, Inc. v. City of Clearwater, 213 F. Supp. 2d 1312 (M.D. Fla. 2002), *rev'd in part on other grounds*, 351 F.3d 1112 (11th Cir. 2003), *cert. denied*, 543 U.S. 813 (2004) 20

H.D.V.-Greektown, LLC v. City of Detroit, 568 F.3d 609 (6th Cir. 2009) 21

Hill v. Colorado, 530 U.S. 703 (2000) 29, 30, 35

Holder v. Humanitarian Law Project, 561 U.S. 1 (2010) 33

Kennedy v. Avondale Estates, 414 F. Supp. 2d 1184 (N.D. Ga. 2005) 20

Linmark Assocs., Inc. v. Township of Willingboro, 431 U.S. 85 (1977) 49

McCullen v. Coakley, 134 S. Ct. 2518 (2014) ..... *passim*

McIntyre v. Ohio Elections Comm'n, 514 U.S. 334 (1995) 34

TABLE OF AUTHORITIES – Continued

Page

Members of City Council of L.A. v. Taxpayers for Vincent,
466 U.S. 789 (1984) 47, 49, 52

Metromedia, Inc. v. City of San Diego,
453 U.S. 490 (1981) ..... *passim*

New York v. Ferber,
458 U.S. 747 (1982) 12

Police Dep't of Chi. v. Mosley,
408 U.S. 92 (1972) 11, 17, 31

R.A.V. v. City of St. Paul,
505 U.S. 377 (1992) 12, 33

Regan v. Time, Inc.,
468 U.S. 641 (1984) 33

Renton v. Playtime Theatres, Inc.,
475 U.S. 41 (1986) 41

Simon & Schuster, Inc. v. Members of State Crime Victims Bd.,
502 U.S. 105 (1991) 11, 15, 33

Solantic, LLC v. City of Neptune Beach,
410 F.3d 1250 (11th Cir. 2005) 20

Sorrell v. IMS Health, Inc.,
131 S. Ct. 2653 (2011) 33

Taylor v. Freeland & Krontz,
503 U.S. 638 (1992) 43

Texas v. Johnson,
491 U.S. 397 (1989) 33

TABLE OF AUTHORITIES – Continued

Page

Tolan v. Cotton,
134 S. Ct. 1861 (2014) 44

Turner Broad. Sys., Inc. v. FCC,
512 U.S. 622 (1994) 11, 18, 27, 28

United States v. Playboy Entm't Grp., Inc.,
529 U.S. 803 (2000) 33

United States v. Stevens,
559 U.S. 460 (2010) 33

Virginia v. Hicks,
539 U.S. 113 (2003) 48

Wag More Dogs, LLC v. Cozart,
680 F.3d 359 (4th Cir. 2012) 21

Ward v. Rock Against Racism,
491 U.S. 781 (1989) ..... *passim*

CONSTITUTION

U.S. Const. amend. I ..... *passim*

U.S. Const. amend. XIV 10, 39

STATUTES AND RULES

Ariz. Rev. Stat. Ann. § 16-1019 49

U.S. S. Ct. R. 10 44

U.S. S. Ct. R. 14.1(a) 42, 43

U.S. S. Ct. R. 24.1(a) 42, 43

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

S. Shapiro, K. Geller, T. Bishop, E. Hartnett, & D. Himmelfarb, *Supreme Court Practice* § 5.12(c)(3) (10th ed. 2013).....45

STATEMENT OF THE CASE

The Town of Gilbert, Arizona enacted a comprehensive ordinance that addresses all manner of signs that are allowed within the town's limits. While many of the signs require permits, Section 4.402(D) exempts various categories of signs from a permit requirement. (Joint Appendix (hereinafter, "App.") 27-30.) At issue in this case is whether Gilbert's differentiation among noncommercial signs that are exempted from the permit requirement is presumptively unconstitutional and subjected to the highest degree of judicial scrutiny that is reserved for laws that directly infringe core First Amendment protections.

Specifically, Petitioners are a church and its pastor who challenge the limitations in the ordinance for providing directional signs to church services. As Petitioners admitted in the proceedings below, their signs fall within the terms of Section 4.402(P), which is entitled "Temporary Directional Signs Relating to a Qualifying Event." (Ninth Circuit, No. 11-15588, Doc. 6 at 13; App. 38-39.) This provision regulates temporary signs "intended to direct pedestrians, motorists, and other passersby to a 'qualifying event.' A 'qualifying event' is any assembly, gathering, activity, or meeting sponsored, arranged or promoted by a religious, charitable, community service, education, or other similar non-profit organization." (App. 70.)

(Respondents will refer to these signs as "Temporary Directional Signs.")[1]

Temporary Directional Signs may be up to 6 feet in height and 6 square feet in area; can be displayed from 12 hours before the event until 1 hour afterwards; "may be located off-site and shall be at grade level"; and cannot be placed in the right of way. (App. 38-39.) Petitioners contrast this provision with regulations for Ideological Signs and Political Signs, each of which are also exempt from a permit requirement, but with different time, place and manner provisions. (Pet'rs' Br. 25.)

An Ideological Sign is defined as "a sign communicating a message or ideas for non-commercial purposes" that is not otherwise defined under the ordinance or "owned or required by a governmental agency." (App. 66-67.) Ideological Signs "are permitted in all zoning districts" and "shall be no greater than 20 square feet in area and 6 feet in height." (App. 32.) A Political Sign is "[a] temporary sign which supports candidates for office or urges action

---

[1] When Petitioners filed their complaint in 2007, Section 4.402(P) was called "Religious Assembly Temporary Directional Signs," and served to exempt off-site directional signs to religious assemblies only from the permit requirement. (App. 75, 123.) Other types of events did not qualify for the exemption. After Gilbert broadened the exemption in 2008 and renamed it "Temporary Directional Signs Relating to a Qualifying Event," Petitioners then amended their complaint to contend that the 2008 provision remained unconstitutional. (App. 73-79, 95-122.) At issue in this proceeding is the 2008 version of the ordinance.

on any other matter on the ballot of primary, general and special elections relating to any national, state or local election." (App. 68.) These signs are allowed as follows:

> Political Signs up to 16 square feet are permitted on property zoned for residential use. Political Signs up to 32 square feet are permitted on property zoned for nonresidential use, undeveloped Town property, and Town rights-of-way. Political Signs shall be removed no later than 10 days following the election, unless otherwise set forth in this article. Political Signs shall not exceed 6 feet in height.

(App. 31.)

Before addressing the proceedings below, it is noteworthy that Petitioners heretofore described their Temporary Directional Signs as simply "signs" or "religious signs." (*See, e.g.*, United States District Court for District of Arizona, No. 2:07-CV-0052-SRB, Doc. 100, at 1-2, 8-9; *id.* at Doc. 109, at 6; Ninth Circuit, No. 08-17384, Doc. 9, at 3-4, 6-8, 16-17, 27, 33 n.7, 55; *id.* at Doc. 18, at 1, 4, 7, 16-17, 25-27; Ninth Circuit, No. 11-15588, Doc. 6, at 2, 4, 6, 9, 13, 15, 23, 25, 42-44, 47-49; *id.* at Doc. 17, at 1, 4-5, 9; *id.* at Doc. 34, at 7, 10-11, 17-18.) Upon reaching this Court, Petitioners renamed their signs as "invitations" that "typically state the Church's name and the phrase, 'Your Community Church,' provide the Church's website address, phone number, location, and service time, and provide directions." (Pet'rs' Br. 8.)

Except for the directional component, the information Petitioners claim they wish to include could be placed on an Ideological Sign, defined as "a sign communicating a message or ideas for non-commercial purposes." (App. 66-67.) Ideological Signs do not have durational limits and are regulated separately from Temporary Directional Signs that pertain to a time-limited "qualifying event." (App. 70.) The material issue, therefore, is whether Gilbert's regulation of Petitioners' directional signs under the Temporary Directional Signs provision is constitutional.

After reviewing the ordinance and the arguments presented, the district court denied Petitioners' motion for a preliminary injunction, finding the Temporary Directional Signs provision is "content-neutral" and satisfies the "intermediate" level of review. (Petition Appendix (hereinafter, ("Pet. App.") 116a-40a.) The Ninth Circuit affirmed that finding on a direct appeal, but remanded for the district court to consider whether Gilbert "impermissibly discriminates among certain forms of noncommercial speech," under the authority of *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981). (Pet. App. 115a.)

After both sides cross-moved on remand, the district court entered summary judgment for Respondents after which Petitioners once again appealed. (Pet. App. 53a-84a.) The Ninth Circuit found that the distinctions among Temporary Directional Signs, Ideological Signs and Political Signs are not based on content and are narrowly-tailored to meet significant governmental interests: "[E]ach classification

and its restrictions are based on objective factors relevant to Gilbert's creation of the specific exemption from the permit requirement and do not consider the substance of the sign." (Pet. App. 25a-26a.)

Petitioners then sought a writ of *certiorari* from this Court, contending that the Ninth Circuit improperly applied a subjective test to conclude that Gilbert's absence of a discriminatory intent rendered the law constitutional. Petitioners contended that the Ninth Circuit's approach was contrary to the objective standard applied in other circuits, justifying review by this Court. Under the heading "Reasons for Granting the Writ," Petitioners summarized the sole issue as "the proper test for judging whether a sign ordinance is content-neutral." (Pet. 18.) Petitioners then urged this Court to accept review so as to "restore an objective standard for gauging sign codes' content neutrality, a recurring free speech issue with broad ramifications for the First Amendment." (*Id.* at 19.) Accordingly, Petitioners fashioned the Question Presented as follows: "Does Gilbert's mere assertion of a lack of discriminatory motive render its facially content-based sign code content-neutral and justify the code's differential treatment of Petitioners' religious signs?" (*Id.* at i.)

The phrasing of the Question Presented ignores that the Ninth Circuit expressly *disavowed* a subjective test. In reviewing the denial of the preliminary injunction, the Ninth Circuit wrote: "Nothing in the regulation suggests any intention by Gilbert to suppress certain ideas through the Sign Code, nor does Good News claim that Gilbert had any illicit motive

in adopting the ordinance. *Gilbert's unimpeached intentions, however, do not satisfy our inquiry.*" (Pet. App. 96a) (emphasis added). The phrasing of the Question Presented assumes nevertheless that (1) the ordinance is "facially content-based"; (2) the Ninth Circuit found it was content-neutral based on the "mere assertion, of lack of discriminatory motive"; and (3) Petitioners' signs are treated differently based on a "religious" message. In their brief on the merits, Petitioners then contend that the ordinance is content-based and should be invalidated under the strict scrutiny level of review.

As explained *infra*, the assumptions embedded in the Question Presented are not supported by the record. More to the point, the Ninth Circuit did not find the ordinance was content-neutral because Gilbert lacked a discriminatory motive, nor does Gilbert defend the ordinance on that basis.[2] The *only* issue before the Court on the merits is whether the

---

[2] Given the phrasing of the Question Presented by Petitioners, several amici curiae – including some of the States – have joined Petitioners to respond in the negative to the biased phrasing of the Question Presented. Each of these *amici* misunderstand the actual issue, which is whether strict scrutiny applies to the provisions of the ordinance that are at issue. Gilbert, in fact, agrees that a government's lack of a discriminatory intent cannot render lawful what would otherwise be an unconstitutional infringement of speech.

ordinance is subject to strict scrutiny.[3] It is to that question that Respondents now turn.

SUMMARY OF THE ARGUMENT

The First Amendment protects against governments censoring speech or meddling in the marketplace of ideas. At the same time, governments may regulate the time, place and manner in which viewpoints and ideas are communicated, primarily in the interests of aesthetics and safety. To guard against governments overreaching in this context, this Court has constructed two levels of review: strict scrutiny, under which laws are deemed presumptively unconstitutional with the burden on the government to show that the regulation is "necessary to serve a compelling governmental interest"; and intermediate scrutiny, under which laws are upheld if they are

[3] At the tail end of their brief, Petitioners state in passing that the ordinance would not survive the intermediate level of scrutiny, but qualify immediately that "[i]ntermediate scrutiny only applies to speech regulations that are content neutral" and any argument to that effect "does not apply to Gilbert's content-based Code, but rather illustrates that Gilbert not only fails strict scrutiny but cannot even pass a lower level of scrutiny." (Pet'rs' Br. 51-53 & n.11.) Petitioners thereby confirm, as discussed *infra*, that the Petition raises the question whether strict scrutiny applies to the ordinance, and does not seek to review the Ninth Circuit's application of the intermediate scrutiny test.

"narrowly-tailored to meet a significant governmental interest."

As a guide to determine which standard applies, courts have examined whether the law restricts the "content" of the speech, which is shorthand for whether the government is infringing on speech based on the viewpoints or ideas expressed. "Content" is not always easy to apply in sign ordinance cases; because signs are forms of speech, differentiations among them can depend on their function and what they say. As such, a formulaic application of "content" to sign ordinances would subject virtually *all* sign regulations to strict scrutiny, which very few laws survive.

Respondents submit that strict scrutiny should be reserved for those regulations that favor certain viewpoints or ideas over others. If a sign code is neutral as to the viewpoints or ideas addressed, both on its face and in its application, a rigid application of "content" would be misplaced; instead, the intermediate level of scrutiny appropriately balances the interests of both the speaker and the general public. Intermediate scrutiny still restrains governments by requiring laws to be tailored narrowly to meet significant government interests, while at the same time allowing flexibility to adapt regulations suited to the needs and aesthetics of the particular jurisdiction. Conversely, the purpose of the strict scrutiny review is disserved where differentiations among types of signs based on their functions do not censor or favor particular viewpoints or ideas.

This approach is a direct outgrowth of *Metromedia*, a 1981 decision in which this Court reviewed a San Diego ordinance that prohibited all signs except for exempted categories such as on-site commercial messages, directional signs and temporary political signs. The plurality upheld the total ban on off-site advertising as a permissible regulation of commercial speech, but invalidated the ordinance nevertheless because it favored commercial speech over noncommercial speech. The plurality further found that the exempted categories impermissibly favored types of speech over others. The two justices who formed the majority, however, concluded that the exemptions were content-neutral, and the remaining three justices would have upheld the distinctions as permissible under the First Amendment. Thus, if *Metromedia* were decided with today's standards in mind, a majority likely would have reviewed the exempted categories in San Diego's ordinance – including directional signs – under the intermediate level of scrutiny.

For these reasons, this Court should respond to the Question Presented by affirming that the intermediate level of scrutiny applies to the provisions at issue. Petitioners did not seek review of the Ninth Circuit's articulation of that level of scrutiny, nor its application of the standard. Instead, they sought (and obtained) review solely on whether the ordinance should have been subjected to strict scrutiny. Consequently, the judgment below should be affirmed upon a finding that the intermediate level of review applies

to the Temporary Directional Signs provision in Gilbert's ordinance.

ARGUMENT

I. INTERMEDIATE SCRUTINY APPLIES TO SIGN ORDINANCES THAT DO NOT FAVOR OR CENSOR VIEWPOINTS OR IDEAS

The core principle underlying the Freedom of Speech clause of the First Amendment is the free expression of ideas. Within constitutional norms, however, the right to speak can (and sometimes, must) yield to government interests. In balancing these competing interests, the Court has devised levels of scrutiny depending on the extent to which legislation impedes one's right to speak. The proper balance can be particularly challenging in sign ordinance cases because signs are forms of speech. Respondents begin with a discussion of the values at stake in the First Amendment analysis before addressing the reasons the intermediate level of scrutiny applies to the Temporary Directional Signs provision in Gilbert's ordinance.

A. The Core Principle Of Freedom Of Speech Is The Expression Of Ideas

The First Amendment (through the Fourteenth Amendment) prohibits governments from enacting any law "abridging the freedom of speech." (Pet. App. 159a.) "At the heart of the First Amendment lies the

principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration and adherence." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994).

> Government action that stifles speech on account of its message, or that requires the utterance of a particular message favored by the Government, contravenes this essential right. Laws of this sort pose the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion. These restrictions "raise the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace."

Id. at 641 (quoting *Simon & Schuster, Inc. v. Members of State Crime Victims Bd.*, 502 U.S. 105, 116 (1991)).

This is so because "government has no power to restrict expression because of its message, its ideas, its subject matter or its content." *Police Dep't. of Chi. v. Mosley*, 408 U.S. 92, 95 (1972). "If the marketplace of ideas is to remain free and open, governments must not be allowed to choose 'which issues are worth discussing or debating.'" *Consol. Edison Co. of N.Y., Inc. v. Pub. Serv. Comm'n*, 447 U.S. 530, 537-38 (1980) (quoting *Mosley*, 408 U.S. at 96.) Stated otherwise, the purpose of the First Amendment is "to preserve an uninhibited marketplace of ideas in

which truth will ultimately prevail." *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 377 (1984) (internal quotation marks and citation omitted).

As with other Constitutional provisions, the "freedom to speak" is not an absolute right. In fact, some categories of speech (such as child pornography) are so utterly lacking in social value that they reside outside the protections of the First Amendment. *New York v. Ferber*, 458 U.S. 747, 763 (1982). Yelling "Fire!" in a crowded movie theater or engaging in so-called "fighting words" are means of expression but they can nevertheless be outlawed. *See, e.g., R.A.V. v. City of St. Paul*, 505 U.S. 377, 386 (1992) (equating unprotected speech with a noisy truck). Yet even expression that is *within* the ambit of the First Amendment can be subject to regulation upon a proper balancing of the right to speak with legitimate interests of the government in regulating discourse in a civilized society. *Metromedia*, 453 U.S. at 501 ("at times First Amendment values must yield to other societal interests.") The challenge is in developing and applying the appropriate test to delineate the constitutional line in discrete circumstances. Because signs are forms of speech, this challenge is ever-present when sign regulations are at issue.

B. The Importance Of *Metromedia* In Regulating Noncommercial Speech

This Court has upheld First Amendment protections most pressingly with respect to noncommercial

speech, as was evident in the 1981 decision in *Metromedia*. In that case, San Diego enacted an ordinance that generally prohibited all signs except on-site commercial messages and specific categories of both commercial and noncommercial speech. "Under this scheme, on-site commercial advertising is permitted, but other commercial advertising and noncommercial communications using fixed-structure signs are everywhere forbidden unless permitted by one of the specified exceptions." *Metromedia*, 453 U.S. at 495-96. After recognizing the importance of signs to convey all manner of messages, as well as the government's interest in controlling their proliferation, the plurality opinion (joined by four justices and authored by Justice White) determined that the ordinance's ban on off-site commercial advertising satisfied the applicable test formulated in *Central Hudson Gas & Electric Corporation v. Public Service Commission*, 447 U.S. 557 (1980) for regulating commercial interests.

The plurality found the ordinance was unconstitutional, however, because it gave greater protection to commercial speech by prohibiting off-site noncommercial speech where some commercial speech was allowed. Thus, the plurality invalidated the ordinance because, on its face, the ordinance allowed commercial speech in zones where noncommercial speech was

prohibited. *Id.* at 520-21.[4] Further, the plurality found that by allowing certain types of noncommercial signs, San Diego had impermissibly chosen subjects for public discourse. Justice White clarified that these "exceptions do not create the infringement, rather the general prohibition does." *Metromedia*, 453 U.S. at 520. "But the exceptions to the general prohibition are of great significance in assessing the strength of the city's interest in prohibiting billboards." *Id.*

The plurality of four justices was joined by a concurring opinion of two justices who invalidated the ordinance as being a total ban on speech, in practical terms. The two concurring justices considered the exceptions from the permitting requirement for types of signs to be "content-neutral prohibitions of particular media of communication." *Metromedia*, 453 U.S. at 526-27 (Brennan, J., concurring). The concurring justices nevertheless joined the plurality because they *rejected* the commercial/noncommercial distinction given the degree of discretion accorded the city in enforcing the appropriate line between the two categories. *Id.* at 538-39. The three dissenting justices agreed with the two concurring justices that the

---

[4] Gilbert's ordinance is constitutional under the plurality's reasoning in *Metromedia* by virtue of Section 4.402(V), which reads as follows: "*No Discrimination against Non-commercial Signs.* Any permitted sign may contain a non-commercial message." (App. 45) (italics in original). Substitution clauses ensure that an ordinance is neutral with respect to the treatment of commercial and noncommercial messages. *Clear Channel Outdoor, Inc. v. City of L.A.*, 340 F.3d 810, 814 (9th Cir. 2003).

distinctions in the exceptions were not based on content and that they should be upheld as permissible under the First Amendment. *Id.* at 542 (Stevens, J., dissenting); *id.* at 564 (Burger, C.J., dissenting); and *id.* at 569 (Rehnquist, J., dissenting).

None of the justices in *Metromedia* addressed directly what has come to be known as the appropriate level of scrutiny, perhaps because it was only the year before that "a principle of equal protection was transformed into one about the government's power to regulate the content of speech in a public forum." *Simon & Schuster*, 502 U.S. at 125 (Kennedy, J., concurring). Interestingly, though, the intermediate scrutiny test is foreshadowed in the plurality opinion's comment that the exceptions from the permit requirement were significant in "assessing the strength of the city's interest." *Metromedia*, 453 U.S. at 520. Chief Justice Burger came even closer to the current articulation of the standard by concluding that the exceptions in the ordinance "are narrowly tailored to peculiar public needs, and do not remotely endanger freedom of speech." *Id.* at 564.

Since then, this Court's jurisprudence has evolved to recognize that some restrictions of speech are more directly intrusive on First Amendment interests than others, giving rise to different levels of review that balance the interests of the government with the right to speak. Under the "strict scrutiny" level of review, a regulation that is deemed to be "content-based" is presumptively unconstitutional, with the government having the burden to show that

the infringement is "necessary to serve a compelling state interest and is narrowly drawn to achieve that end." *Simon & Schuster*, 502 U.S. at 118 (quoting *Ark. Writers' Project v. Ragland*, 481 U.S. 221, 231 (1987)). To survive this standard, the law must be "the least restrictive or least intrusive means" of meeting the government's interests. *McCullen v. Coakley*, 134 S. Ct. 2518, 2525 (2014) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989)).

In contrast, content-neutral laws are reviewed under the so-called "intermediate level of scrutiny," which means the law is not presumptively unconstitutional and the restrictions are upheld provided "they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information." *Ward*, 491 U.S. at 791 (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)). Under this test, the government cannot burden "substantially more speech than is necessary to further the government's legitimate interests." *Id.* at 799.

Laws that are subject to strict scrutiny are unlikely to be found constitutional. *See Burson v. Freeman*, 504 U.S. 191, 211 (1992) (plurality) ("it is the rare case in which we have held that a law survives strict scrutiny."). That is appropriate because laws that either censor or restrain speech because of the ideas or viewpoints expressed are anathema to First Amendment ideals. While the intermediate level of scrutiny is less onerous, it by no means assures the law will be found constitutional. *See McCullen*, 134

S. Ct. at 2534-41 (invalidating a content-neutral law under the intermediate scrutiny test).

The intermediate test does, however, give governments flexibility to regulate vehicles of communication based on the interests of the particular jurisdiction while striking an appropriate balance with the fundamental right to speak. So long as the government does not restrict speech "because of its message, its ideas, its subject matter or its content," *Mosley*, 408 U.S. at 95, the First Amendment concern that justifies application of the strict scrutiny test is not implicated. Instead, the constitutionality of the regulation is suited for the less rigorous, yet still demanding, intermediate level of scrutiny.

C. The Content-Neutrality Standard Is An Aid In Identifying Restrictions That Are Subject To Strict Scrutiny

Given the significance of the level of review to the outcome of the inquiry, considerable litigation has arisen to determine whether a regulation is based on "content" and therefore subject to the most onerous and exacting scrutiny. As explained in *Ward*, "[t]he principal inquiry in determining content neutrality is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." 491 U.S. at 791.

> A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others.

> Government regulation of expressive activity is content neutral so long as it is "justified without reference to the content of the regulated speech."

Id. (quoting *Clark*, 468 U.S. at 293) (emphasis omitted).

Although the test is stated clearly, "[d]eciding whether a particular regulation is content based or content neutral is not always a simple task." *Turner*, 512 U.S. at 644. This is particularly true in sign cases; because signs are forms of speech, distinctions between types of signs could be branded as being based on "content," and subjected to strict scrutiny, without regard to the different functions involved. Especially when they are off-site and unattended, signs can present particular problems.

> Unlike oral speech, signs take up space and may obstruct views, distract motorists, displace alternative uses for land, and pose other problems that legitimately call for regulation. It is common ground that governments may regulate the physical characteristics of signs – just as they can, within reasonable bounds and absent censorial purpose, regulate audible expression in its capacity as noise.

City of Ladue v. Gilleo, 512 U.S. 43, 48 (1994).

Consider as well that the content-neutrality test is a judicial construction to assist in interpreting the purposefully-broad language of the First Amendment. The word "content" is not in the First Amendment; it

is a term of art that has been employed to identify the types of regulations that should be subjected to strict scrutiny. Given that all signs are a form of speech, commonly-accepted distinctions can be considered based on content, such as regulations that differentiate between commercial and noncommercial speech, or between on-site and off-site signs. *Metromedia*, *supra*. Likewise, such designations as historical landmarks or commemorative plaques could be considered "content," under an absolutist construction of that term, without consideration of the purpose of the test in the first place. As the Ninth Circuit commented in the decision below, accepting Petitioners' view would mean that "every sign, except a blank sign, would be content based." (Pet. App. 105a.)

One court has summarized succinctly the difficulty in determining whether a sign ordinance is content-based or content-neutral as follows:

> What makes the content-based versus content-neutral distinction so difficult in cases involving sign ordinances is that, by their very nature, signs are speech and thus can only be categorized, or differentiated, by what they say. This makes it impossible to overlook a sign's "content" or message in attempting to formulate regulations of signage and make exceptions for distinctions required by law (i.e., for sale signs) or for those signs that are narrowly tailored to a significant government interest of safety (i.e., warning or construction signs). In many

> cases, this classification raises the "red flag" of an impermissible content-based regulation.

Granite State Outdoor Advertising, Inc. v. City of Clearwater, 213 F. Supp. 2d 1312, 1333-34 (M.D. Fla. 2002), *rev'd in part on other grounds*, 351 F.3d 1112 (11th Cir. 2003), *cert. denied*, 543 U.S. 813 (2004). *See also Kennedy v. Avondale Estates*, 414 F. Supp. 2d 1184, 1198 (N.D. Ga. 2005) (rejecting as "catch-22 logic" that an ordinance is content-based if one must read the sign to determine if the regulation applies).

The lower courts have dealt with this conundrum in markedly different ways. On one end of the spectrum, some circuits have devised an easy-to-apply but rigid standard based on whether one needs to read the message to determine whether the restriction applies. *E.g.*, *Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250, 1266 (11th Cir. 2005) ("allow[ing] some types of messages to be displayed in a more prominent manner than others – for example, using flashing lights or moving parts – [the ordinance] constitutes content-based regulation of speech.").

Other circuits have rejected a formulaic approach that would deem most regulations to be based on content. *E.g.*, *Brown v. Town of Cary*, 706 F.3d 294, 302 (4th Cir. 2013) (rejecting *Solantic*'s analysis as "absolutist" because it "imputes a censorial purpose to every content distinction, and thereby applies the highest judicial scrutiny to laws that do not always

imperil the preeminent First Amendment values that such scrutiny serves to safeguard");[5] *H.D.V.-Greektown, LLC v. City of Detroit*, 568 F.3d 609, 622 (6th Cir. 2009) (finding differentiations between "advertising signs," "business signs," and "political signs" were not content-based because "[t]here is simply nothing in the record to indicate that the distinction between the various types of signs reflect a meaningful preference for one type of speech over another").

As Justice Kennedy has observed, "zoning regulations do not automatically raise the specter of impermissible content discrimination, *even if they are content based*, because they have a prima facie legitimate purpose: to limit the negative externalities of land use." *City of L.A. v. Alameda Books, Inc.*, 535 U.S. 425, 449 (2002) (Kennedy, J., concurring) (emphasis added). As he continued, "[t]he zoning context provides a built-in legitimate rationale, which rebuts the usual presumption that content-based restrictions are unconstitutional. *For this reason, we*

---

[5] Under the Fourth Circuit's test, a restriction is not content-based if:

> (1) the regulation is not a regulation of speech, but rather a regulation of the places where some speech may occur; (2) the regulation was not adopted because of disagreement with the message the speech conveys; or (3) the government's interests in the regulation are unrelated to the content of the affected speech.

Wag More Dogs, LLC v. Cozart, 680 F.3d 359, 366 (4th Cir. 2012) (citation omitted).

apply intermediate rather than strict scrutiny." Id. (emphasis added).

As this discussion shows, virtually all sign regulations could be subject to strict scrutiny if the term "content" is applied too rigidly. In turn, the regulation would be unconstitutional unless the government could show that the distinctions drawn are "necessary to serve a compelling state interest" and "narrowly drawn to achieve that end." Applying the word "content" to determine the level of review without regard for the purpose of the strict scrutiny test, in other words, is misplaced where the result would subject all manner of sign regulations (such as physical contours of signs) to a level of review that they "rarely" survive. Instead, "content" should be applied flexibly to reflect the First Amendment ideals that the levels of scrutiny are designed to safeguard in the first place: the protection of viewpoints and ideas from government censorship or favoritism. If a sign regulation does not censor or favor particular viewpoints or ideas, the constitutionality of distinctions between types of signs should be reviewed under the intermediate level of scrutiny.

II. BECAUSE GILBERT'S ORDINANCE DOES NOT RESTRICT VIEWPOINTS OR IDEAS, IT IS NOT SUBJECT TO STRICT SCRUTINY

Turning to the case at hand, Petitioners contend that the distinctions in the ordinance among types of

signs are based on content, and therefore should have been reviewed (and invalidated) under a strict scrutiny analysis. To assist them in that endeavor, Petitioners have relabeled their signs (in this Court) as "invitation" signs and contend they communicate a religious message because the signs contain the phrase "Your Community Church" along with the "website address, phone number, location, and service time, and provide directions." (Pet'rs' Br. 8; *see also id.* at 7, 13, 14, 18, 26, 33 n.8, 45, 46, 47.) They posit (without support) that the signs "are an essential means by which [the church] invites the public to its services" because temporary signs are inexpensive "and play a critical role ensuring people know where to find a Church that periodically moves." (*Id.* at 8.) They argue further that Gilbert has differentiated among types of signs based on the content of the expression such that the ordinance should have been reviewed under the strict scrutiny level of review.

A. The Temporary Directional Signs Provision Regulates "Directions" To Specified Events, Not "Invitations" To The Public

Petitioners' re-characterization of the signs at issue as "church invitation signs" in this Court is a transparent attempt to downplay the fact that (1) they admitted in the proceedings below that their signs qualify as Temporary Directional Signs under the sign code (Ninth Circuit, No. 11-15588, Doc. 6 at 13); and (2) Petitioners may display the messages

they desire to display (absent the directions) as Ideological Signs. By definition, Ideological Signs contain noncommercial messages that do not fall within the definitions of other types of signs *such as Temporary Directional Signs*. (App. 66-67.) The information that Petitioners claim they wish to include on their signs meet the definition of an Ideological Sign – except for Petitioners' choice to include directions to a "qualifying event." (App. 70.) Ideological Signs, in turn, "are permitted in all zoning districts"; can be up to "20 square feet in area and 6 feet in height"; and are not limited in duration or number. (App. 32.) Notably, Petitioners consider the Ideological Signs provision to be the "most favorable provision" in the ordinance. (Ninth Circuit, No. 08-17384, Doc. 18, at 18 n.10.)

Petitioners therefore are plainly wrong when they state that a sign saying "Learn Why Voting Matters, Visit Good News Community Church" can be only 6 square feet under the Temporary Directional Sign provision. (Pet'rs' Br. 28.) Likewise, they plainly misconceive the provisions when they state that "an atheist group could post a 20 square foot sign that says 'Don't Waste Your Time On Superstition, Skip Good News' Services Sunday' right next to Good News' 6 square foot church invitation sign that could only be displayed for a handful of hours." (*Id.* at 33 n.8.) If an atheist group were to do that, Petitioners could in turn post 20 square foot Ideological Signs, for infinite duration, saying (for example): "The Fool Says In His Heart, 'There Is No God.' Worship With Us at Good News Community Church." Petitioners

could then post a Temporary Directional Sign nearby directing travelers to its "qualifying event."

In addition, and also without a permit, Petitioners could utilize A-Frame Signs[6] or Sign Walkers, to publicize their mission and their weekly services apart from Ideological Signs and Temporary Directional Signs. (App. 29-30, 34-37, and 45-46.) Indeed, Good News has utilized *many* other outlets at its disposal to "invite" the public to its events, including its website, handbills, door-to-door visitations, newsletters, pamphlets and personal solicitations. (SER 69-71.) Good News has had a website since 2000, and has purchased advertising space in three local newspapers and the Yellow Pages of the telephone book to tell the world about its mission and the location of its weekly services. (Excerpts of Record, Ninth Circuit, No. 11-15588, Doc. 8 (hereinafter, "ER") at 655-56, 658-59.) Petitioner Reed makes unsolicited telephone calls and sends unsolicited emails, and Good News even hired an advertising company to distribute flyers "in neighborhoods surrounding" the location of the meeting place. (*Id.* at 665-66.) Petitioner Reed testified that personal solicitations are the most successful means of inviting members of the public to

---

[6] Good News in fact has *six* A-Frame signs that it has utilized. (Supplemental Excerpts of Record, Ninth Circuit, No. 11-15588, Doc. 16 (hereinafter, "SER") at 72.) Although the A-Frame Signs provision is intended for commercial purposes (App. 34-37), the code contains a non-discrimination provision under which "[a]ny permitted sign may contain a non-commercial message." (*Id.* at 45.)

church services (as opposed to Temporary Directional Signs). (SER 76.) Tellingly, even when Good News moved out of Gilbert, Petitioners limited the number of directional signs given their narrow effectiveness. (*Id.* at 81.)

The myriad ways in which Petitioners invite the public to church events shows the lack of support for their bold statement that Temporary Directional Signs are "essential" to invite the public to their events. (Pet'rs' Br. 8.) The only limitation imposed by the ordinance is to place off-site signs that, by definition, are intended to direct the attention of "pedestrians, motorists and other passersby" to aid flow for a limited period of time. (App. 70.) Petitioners do not (and could not) dispute that Gilbert can regulate directional signs in the interests of aesthetics and safety. Notably, the provision applies to signs for *temporary* events, which, if unrestricted, could proliferate and become a blight long after the events took place.

In sum, while Petitioners cannot include directions to "qualifying events" on an Ideological Sign, they can include "invitations" on Temporary Directional Signs provided they comply with the time, place and manner restrictions of the ordinance. The fact that Good News does not have a permanent location and occasionally relocates does not have significance constitutionally, as an "incidental effect on some speakers or messages but not others" does not subject a law to strict scrutiny. *Ward*, 491 U.S. at 791. Likewise, this Court should reject any contention by the *amici* that Gilbert has restricted Petitioners'

ability to practice their religion, because the religious aspect of the signs is not the basis for the regulation.[7] Instead, the only material issue is whether the regulation of off-site signs that contain directions for temporary events complies with constitutional norms.

B. The Temporary Directional Signs Provision Does Not Censor Or Favor Viewpoints Or Ideas

Substantively, the Temporary Directional Signs provision applies equally to all non-profit organizations – including Good News – without regard to who is sponsoring the temporary event or the subject matter of the event. Because the provision does not limit any noncommercial speaker from erecting Temporary Directional Signs, there is no concern about Gilbert either endorsing or suppressing "ideas or viewpoints," which lies at the heart of First Amendment considerations.

1. Laws that do not favor or censor views or ideas are subject to the intermediate level of scrutiny

Turner presents a prime example of a law subject to intermediate scrutiny. In that case, federal regulations required cable operators to carry certain broadcasts

---

[7] Moreover, the "free exercise" clause of the First Amendment was not part of the lower courts' rulings on the application of the level of scrutiny, nor is that clause included within the Question Presented.

out of a concern for the continued viability of local television stations. While acknowledging that the regulations "interfere with cable operators' editorial discretion," this Court reasoned that "the extent of the interference does not depend upon the content of the cable operators' programming." *Turner*, 512 U.S. at 643-44.

> It is true that the must-carry provisions distinguish between speakers in the television programming market. But they do so based only upon the manner in which speakers transmit messages to viewers, and not upon the messages they carry. So long as they are not a subtle means of exercising a content preference, speaker distinctions of this nature are not presumed invalid under the First Amendment.

Id. at 646. This Court further found no suggestion that the "manifest purpose" of the facially-neutral regulation was "to regulate speech because of the message it conveys." *Id.*[8]

---

[8] The Ninth Circuit found nothing in the record to suggest that Gilbert had an improper motive in enacting the Temporary Directional Signs provision. (Pet. App. 96a.) Petitioners contend nevertheless that by amending the provision in 2011 to apply to events in Gilbert only, Respondents "targeted Good News." (Pet'rs' Br. 15.) Because the courts below considered the constitutionality of the 2008 version, the record is not developed on the reasons for the Gilbert-only provision of the 2011 amendment. In addition, Petitioners would lack standing to raise it for the first time in this Court given that they are located in Gilbert. (*Id.* at 16.)

More recent decisions by this Court further compel the conclusion that Gilbert's Temporary Directional Sign provision is neutral as to viewpoints or ideas, for purposes of determining the level of scrutiny at issue. In *Hill v. Colorado*, 530 U.S. 703 (2000), a statute created a 100-foot zone around entrances to health care facilities, in which it was unlawful to approach within 8 feet of someone to engage in "protest, education or counseling." Relying on the test in *Ward*, a majority of justices concluded the regulation was content-neutral because it did not restrict "either a particular viewpoint or any subject matter that may be discussed by a speaker." *Id.* at 723 (2000).

> Instead of drawing distinctions based on the subject that the approaching speaker may wish to address, the statute applies equally to used car salesmen, animal rights activists, fundraisers, environmentalists, and missionaries. Each can attempt to educate unwilling listeners on any subject, but without consent may not approach within eight feet to do so.

Id. Similarly, the statute at issue in *McCullen* made it a criminal offense for anyone to remain within 35 feet of reproductive health facilities during business hours, other than certain exempt classes of people. Citing the test from *Ward*, a majority of justices found the statute was content-neutral, chiefly because (except for the exempt classes) one's mere presence violated the statute without regard to the content of the speech. *McCullen*, 134 S.Ct. at 2531.

If anything, the provision at issue in Gilbert's ordinance is *less* intrusive on speech than the statute in *Hill* that restricted "protest, education or counseling" in proximity to a healthcare facility, let alone the total ban in *McCullen*. The Temporary Directional Signs provision applies to all non-profit organizations, Good News and atheists alike, and nothing about its terms targets or favors any particular speech. To subject the ordinance to the highest level of scrutiny would wrench the constitutional precepts from their moorings contrary to case law and common sense, and in a manner never intended by the First Amendment.

Respondents acknowledge that several justices wrote opinions in both *Hill* and *McCullen* that disagreed with the content-neutrality analysis, premised on the fact that the statutes applied to entrances to facilities that perform abortions and therefore targeted, for practical purposes, those who oppose abortions. The authors of these opinions concluded that even if the statutes were neutral on their face, their purpose was to suppress disfavored speech based on viewpoints and ideas that criticized abortion. No similar consideration is at issue in this case as Gilbert did not enact the Temporary Directional Signs provision to suppress viewpoints or ideas, or the ability to direct the public to "qualifying events."

Likewise, any criticism that *Hill* was wrongly founded on a right to be protected from offensive speech (*McCullen*, 134 S.Ct. at 2545-46 (Scalia, J.,

dissenting)) would be misplaced here. There is no suggestion that Gilbert enacted the Temporary Directional Signs provision to protect anyone from offensive speech. Indeed, because the First Amendment does not require directional signs, Gilbert could have banned them altogether. Viewed in that light, Gilbert has *allowed* religious organizations such as Good News (and other non-profit associations) to post directions to "qualifying events" that would otherwise be prohibited. In any event, given that the provision is neutral as to viewpoints and ideas, the intermediate level of scrutiny was appropriate.

2. Gilbert's provisions are easily distinguishable from regulations that are subject to strict scrutiny

Petitioners nevertheless argue that the ordinance is content-based, by citing to four cases where the law at issue targeted particular viewpoints or ideas. (Pet'rs' Br. 27-28.) In *Mosley*, the city banned all picketing within 150 feet of school buildings, from a half hour before and after the school was in session, "except peaceful picketing of any school involved in a labor dispute." 408 U.S. at 93. Because it favored picketing regarding labor disputes at the particular school, and censored all other peaceful protests, the ordinance was based improperly "on content alone." *Id.* at 96. In contrast, Gilbert's Temporary Directional Signs provision applies equally to all non-profit organizations regardless of the event to which directions are provided.

Next, Petitioners cite *City of Cincinnati v. Discovery Network*, 507 U.S. 410 (1993), where the Court evaluated the constitutionality of a ban on newsracks that contained commercial handbills while allowing newsracks with "traditional newspapers." Finding that "[e]ach newsrack, whether containing 'newspapers' or 'commercial handbills,' is equally unattractive," *id.* at 425, this Court invalidated the ordinance under the *Central Hudson* test applicable to *commercial* speech that requires a "reasonable fit" between the regulation and the city's legitimate interests. By favoring "traditional newspapers" and censoring "commercial handbills," Cincinnati's legitimate interest in limiting the number of newsracks, in other words, had nothing to do with the content they were allowed to contain.

Unlike signs, newsracks do not in and of themselves convey a message, as their purpose is to allow the dissemination of ideas and speech. In further contrast from Gilbert's Temporary Directional Signs provision, newsracks are not intended to direct traffic through the physical environment. As explained in *Metromedia*, "[e]ach method of communicating ideas is 'a law unto itself' and [the] law must reflect the 'differing natures, values, abuses and dangers' of each method." 453 U.S. at 501. In addition, Gilbert's provision applies equally regardless of the sponsor of the "qualifying event" that is taking place, to which directions are provided. For these reasons, the facts and holding of *Discovery Network* are distinguishable from the case at bar.

Petitioners next rely on *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010), which considered a statute that made it unlawful to support foreign terrorist organizations, and *United States v. Stevens*, 559 U.S. 460 (2010), which addressed a statute that banned depictions of animal cruelty for commercial gain. In both of these cases, the statutes targeted specific speech deemed harmful. There is nothing about Gilbert's Temporary Directional Signs provision that pertains remotely to the activities that the government aimed to censor in these cases. In contrast, laws that are subject to strict scrutiny target speech based on the viewpoints or the ideas expressed,[9]

---

[9] *See, e.g., Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729 (2011) (statute targeted sale or rental of violent video games to minors); *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653 (2011) (statute restricted use of pharmacy records that reveal prescribing practices of individual doctors for marketing purposes); *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803 (2000) (statute targeted sexually explicit television programming); *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) (statute targeted speech that insults or provokes violence "on the basis of race, color, creed, religion, or gender"); *Simon & Schuster, Inc. v. Members of State Crime Victims Bd.*, 502 U.S. 105 (1991) (statute targeted artistic works describing one's crimes); *Texas v. Johnson*, 491 U.S. 397 (1989) (statute criminalized desecration of American flag); *Ark. Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987) (statute exempted certain types of periodicals from sales tax); *Regan v. Time, Inc.*, 468 U.S. 641 (1984) (statute banned depictions of currency except for "educational" or "newsworthy" purposes); *Boos v. Barry*, 485 U.S. 312 (1988) (statute banned displays critical of foreign governments within 500 feet of an embassy or consulate); *FCC v. League of Women Voters of Cal.*, 468 U.S. 364 (1984) (statute banned editorializing by noncommercial education broadcasting stations); *Consol.*

(Continued on following page)

including "core political speech,"[10] that is at the heart of First Amendment protections.

3. A sign ordinance is not subject to strict scrutiny simply because a sign must be read to determine compliance

Essentially, Petitioners are advocating that this Court adopt the "absolutist" rule that Gilbert's ordinance is "content-based" (and therefore subject to strict scrutiny) because the provisions differentiate between types of signs that perform different functions. The absurdity of this reasoning is perhaps most evident in the final paragraph of Petitioners' brief, where the only suggestion they offer to steer clear of content-based distinctions is for governments to "treat[ ] all temporary signs the same." (Pet'rs' Br. 52.) This logic echoes their argument that an ordinance "is content based because enforcement officials must determine what a sign says to decide what limitations apply." (*Id.* at. 38.) For support, Petitioners cite to a

---

Edison Co. of N.Y., Inc. v. Pub. Serv. Comm'n, 447 U.S. 530 (1980) (regulation banned utility bills from including "opinions or viewpoints on controversial issues of public policy"); *Carey v. Brown*, 447 U.S. 455 (1980) (statute exempted labor disputes from a ban on picketing).

[10] *See, e.g., McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995) (statute burdened "core political speech" by banning anonymous leaflets designed to influence voters in an election); *Burson v. Freeman*, 504 U.S. 191 (1992) (statute banned political campaigning within 100 feet of entrance to polling place).

clause in *McCullen* while overlooking that the ban in *McCullen* contained exemptions for some individuals, which would require enforcement officials to determine the reason for their presence to determine if the limitations apply. This Court has "never held, or suggested, that it is improper to look at the content of an oral or written statement in order to determine whether a rule of law applies to a course of conduct." *Hill*, 530 U.S. at 722.

Moreover, *McCullen* did not involve a sign regulation, which distinguishes signs by the speech at issue. Even under Petitioners' reasoning in the last paragraph of their brief, a regulation that applies to all "temporary signs" would require enforcement officers to examine the "content" of the sign to determine whether it is in fact a "temporary sign" as defined in Gilbert's regulation. (App. 70.) If a simplistic if-you-have-to-read-it-it-is-content-based test were adopted, virtually all distinctions in sign laws would be subject to strict scrutiny, thereby eviscerating sign regulations that have been repeatedly upheld under the First Amendment as serving important governmental interests such as safety and aesthetics.

Requiring sign regulations to serve "compelling governmental interests" would be misplaced and result in very few regulations surviving scrutiny. Instead, strict scrutiny should be reserved for sign regulations that *do* differentiate based on ideas or viewpoints. Because the strict scrutiny analysis is a searching inquiry intended to safeguard the preeminent First Amendment values, it simply does not

fit in the context of sign regulations that by definition apply to different forms of speech. Instead, the reasonableness of the limitations that do not censor or favor views or ideas should be reviewed under the intermediate level of scrutiny, which protects First Amendment concerns, while at the same time allowing governments to regulate signage in a reasonable manner tailored to the legitimate interests of the particular locale at issue.

4. Differences between Ideological Signs and Political Signs do not warrant strict scrutiny

In addition to contending that the Temporary Directional Signs category is based on content, Petitioners contend the Ninth Circuit should have applied strict scrutiny because Gilbert has differentiated between speech that falls within the categories of Ideological Signs and Political Signs. Petitioners do not question Gilbert's ability to regulate these types of signs, but contend the regulatory distinctions are based on the "content" of the sign, which in turn triggers a strict scrutiny standard. Essentially, Petitioners question whether Gilbert can justify the restrictions on Temporary Directional Signs based on legitimate governmental interests, given what they claim are more lax restrictions for other types of signs.

By this argument, Petitioners are essentially questioning whether Gilbert is being consistent in

advancing its legitimate interests in aesthetics and safety, and not whether legitimate interests are in fact being advanced. The consistency with which a government advances legitimate interests is not fodder for the most exacting scrutiny, which is reserved for restrictions on viewpoints and ideas.

Just as a rigid "content" definition would subject the neutral language of the Temporary Directional Signs provision to strict scrutiny standing on its own, so too would that approach be inequitable as applied to distinctions *among* various types of noncommercial signage that are defined in neutral terms. The better approach, as discussed herein, is to allow governments the flexibility to distinguish between noncommercial signs by applying the intermediate level of scrutiny to those distinctions, as long as they advance governmental interests and are neutral as to particular ideas or viewpoints expressed within the regulatory limitations. Governments would still not be able to meddle in the marketplace of ideas, and would still have to ensure reasonable consistency in advancing government interests across different sign types.

This approach has its roots in *Metromedia*, where, similar to Gilbert's code, San Diego's code exempted such signs as "approved, temporary, off-premises, subdivision directional signs" and "temporary political campaign signs." *Metromedia*, 453 U.S. at 495. Although the four justices in the plurality found the ordinance was unconstitutional, they did not do so because of the exceptions:

> The exceptions do not create the infringement, rather the general prohibition does. But the exceptions to the general prohibition are of great significance in assessing the strength of the city's interest in prohibiting billboards. We conclude that by allowing commercial establishments to use billboards to advertise the products and services they offer, the city necessarily has conceded that some communicative interests, *e.g.*, onsite commercial advertising, are stronger than its competing interests in esthetics and traffic safety. It has nevertheless banned all noncommercial signs except those specifically excepted.

Id. at 520. In essence, the plurality was applying an early formulation of the intermediate scrutiny standard to the exceptions in order to test the validity of the city's interests. To do so in today's parlance, the plurality would have had to deem the exceptions to be content-neutral.

In that respect, a careful review of the various opinions in *Metromedia* reveals that a majority of the justices viewed the exemptions from the ordinance as permissible from a constitutional perspective. Justices Brennan and Blackmun concurred in the judgment, but viewed the exceptions as "content-neutral." *Id.* at 526-27 (Brennan, J., concurring). In his dissent, Justice Stevens reasoned that the exceptions were "content-neutral" and, "[t]o the extent that the exceptions related to subject matter at all, I can find no suggestion on the face of the ordinance that San

Diego is attempting to influence public debate on particular issues." *Id.* at 554 (Stevens, J., dissenting).

Prophetically, Chief Justice Burger foreshadowed the current intermediate level of scrutiny in a separate dissent, writing that "[t]he exceptions San Diego has provided – the presence of which is the plurality's sole ground for invalidating the ordinance – are few in number, are narrowly tailored to peculiar public needs, and do not remotely endanger freedom of speech." *Metromedia*, 453 U.S. at 564 (Burger, C.J., dissenting). He continued: "The plurality today trivializes genuine First Amendment values by hinging its holding on the city's decision to allow some signs while preventing others that constitute the vast majority of the genre." *Id.* at 565. Finally, in his dissent, Justice Rehnquist agreed "substantially with the views expressed in the dissenting opinions of The Chief Justice and Justice Stevens," adding that in his view the exceptions in the San Diego ordinance provided reasonable outlets "for the free expression which the First and Fourteenth Amendments were designed to protect." *Id.* at 569-70 (Rehnquist, J., dissenting).

A close reading of the case thus shows that the justices who decided *Metromedia* would likely have reviewed the exceptions under the intermediate scrutiny test had the case been decided with today's standards in mind. As in the San Diego ordinance, the various categories of speech in Gilbert's ordinance

are based on objective factors that serve different functions.[11] Whether Gilbert has favored certain types of signs over others in the course of advancing permissible interests is a matter of consistency that the intermediate level of scrutiny is especially formulated to address. So long as the government does not interfere with the ability to speak on particular topics or to express different viewpoints, regulations concerning the time, place and manner of signs should *not* be subject to the highest level of scrutiny.[12] To hold

---

[11] Petitioners contend the ordinance allows subjectivity in its application, claiming enforcement officers have discretion in determining the application of its provisions. In support, Petitioners cite to testimony provided in response to unrealistic hypothetical scenarios that are not related to Petitioners' signs. (Pet'rs' Br. 40-41.) A vagueness challenge is not before the Court, however, and an individual employee's response to unrealistic hypotheticals does not determine the proper level of scrutiny for First Amendment purposes. Moreover, the officials testified consistently that a noncommercial sign with a directional arrow would fall within the provision at issue in this case. (ER 260, 283, 308, 357.) When pressed further, one witness testified he would ask his supervisor. (*Id.* at 358.) "[P]erfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." *Ward*, 491 U.S. at 794.

[12] This approach is consistent as well with the government's ability to restrict the secondary effects of adult entertainment, provided the restriction is not aimed at the content of the speech. While recognizing that adult entertainment can be protected "speech," regulations are "content-neutral" if they do not ban speech, but instead address the link between adult entertainment businesses and certain demonstrated secondary effects such as an increase in crime. In *Alameda Books*, for example, an ordinance was "deemed content-neutral" (and thus reviewable under the intermediate scrutiny test) because it was "aimed not at the content of the films shown at adult theaters,

(Continued on following page)

otherwise would trivialize First Amendment values by subjecting land use decisions to the most exacting review, virtually nullifying the discretion to pass laws regulating land use, which is a basic governmental function.

III. APPLICATION OF THE INTERMEDIATE LEVEL OF SCRUTINY IS NOT BEFORE THE COURT

In their petition for a writ of certiorari, Petitioners asked this Court to resolve whether the content-neutrality test should be based on an objective standard, claiming the circuits were split, with some applying a subjective standard. Neither the petition nor the Question Presented that Petitioners drafted raises the Ninth Circuit's articulation or application of the intermediate scrutiny test for review. Likewise, in their merits brief, Petitioners argue that the strict scrutiny test should have been applied to the ordinance. The only reference to intermediate scrutiny is in two paragraphs at the tail end of their merits brief, neither of which applies the intermediate scrutiny test. The first paragraph recites the standard for *commercial* speech from *Discovery Network* – which Petitioners concede "is comparable to intermediate

---

but rather at the secondary effects of such theaters on the surrounding community, namely, crime rates, property values and the quality of the city's neighborhoods." 535 U.S. at 434 (citing *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47-49 (1986)).

scrutiny" – and the second paragraph merely states, in conclusory form, that the distinctions in the ordinance bear no reference to Gilbert's interests. (Pet'rs' Br. 52-53.) Petitioners qualify that short blip with a footnote reiterating that they are mentioning the intermediate test solely to support their contention that the ordinance does not pass the strict scrutiny test. (*Id.* at 52 & n.11.)

Supreme Court Rule 14.1(a) limits a grant of *certiorari* to "the questions set out in the petition, or fairly included therein." In kind, Supreme Court Rule 24.1(a) makes plain that a party "may not raise additional questions or change the substance" of the questions presented in the petition for writ of *certiorari*. Because Petitioners did not raise application of the intermediate scrutiny test in their petition, and that test is not included within the strict scrutiny determination, the Court's inquiry is at its end if it concludes that strict scrutiny does not apply.

Respondents do note that the United States has filed an amicus brief agreeing with Respondents that strict scrutiny does not apply, but going further and arguing that the intermediate level of scrutiny should be applied in such a manner that would uphold analogous provisions in the federal Highway Beautification Act. Tellingly, to address the application of the intermediate level test, the United States had to rewrite and broaden the Question Presented ***in its entirety***, replacing it to read as follows: "Whether respondents' sign ordinance, which imposes more stringent limitations on certain 'temporary directional

signs' than it imposes on 'ideological' or 'political' signs, violates the First Amendment." (United States' Amicus Br. (I).) The United States' replacement of the Question Presented runs afoul of Supreme Court Rules 14.1(a) and 24.1(a) quoted above. As such, the United States has overreached by going beyond the scope of the issues before the Court for merits review, in a blatant attempt to address the constitutionality of a federal statute that is likewise not before the Court for review.

These rules are not simply technical, as they are central to delineating this Court's grant of discretionary jurisdiction and are founded on a notion of fairness to the litigants and the process. "These principles help to maintain the integrity of the process of certiorari. The Court decides which questions to consider through well-established procedures; allowing the able counsel who argue before us to alter these questions or to devise additional questions at the last minute would thwart this system." *Taylor v. Freeland & Krontz*, 503 U.S. 638, 646 (1992) (internal citation omitted); *see also Chandris, Inc. v. Latsis*, 515 U.S. 347, 353 n.* (1995) ("Because petitióners did not raise the issue in the petition for certiorari, we will not consider any argument they may have concerning the effect of respondent's failure to object to the seaman status jury instructions in their entirety.").

Along these lines, Respondents will be unfairly prejudiced if Petitioners are allowed to interject the application of the intermediate level of scrutiny into

the case at this juncture. Directly to that point, Petitioners have not presented arguments in their opening brief to which Respondents can respond so that the Court can have full and complete written arguments for consideration. As a matter of fundamental fairness, and court procedures, Petitioners should be held to have "meant what they said and said what they meant" in presenting grounds for review in their petition.

Had Petitioners intended to seek review of the Ninth Circuit's application of the intermediate level of scrutiny, it behooved them to include that issue as part of the Question Presented and within the petition itself seeking review. In due course, this Court could have then determined whether that separate issue warranted plenary review along with the question actually presented, which is whether the strict scrutiny test should have been applied. Even a cursory review of the petition in this case confirms that Petitioners sought review based on a contention that the circuits were split on whether strict scrutiny applied to ordinances such as the one at issue in this case.

Notably, a split in the circuits is one of the "compelling reasons" provided for granting review under Supreme Court Rule 10. In contrast, "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." *Id.*; *see also Tolan v. Cotton*, 134 S. Ct. 1861, 1868 (2014) (Alito, J., concurring) ("error correction is outside

the mainstream of the Court's functions and . not among the 'compelling reasons' that govern the grant of certiorari") (alteration in original) (quoting S. Shapiro, K. Geller, T. Bishop, E. Hartnett, & D. Himmelfarb, *Supreme Court Practice* § 5.12(c)(3) (10th ed. 2013)).

Here, no contention has been made that the Ninth Circuit erred in articulating the intermediate level test that has been established by this Court, and no advocacy is made to adopt a new or different articulation of the standard. Instead, the United States simply urges this Court to apply the intermediate scrutiny test which would (in a future case, presumably) result in the Highway Beautification Act being upheld as permissible under the First Amendment. In an abundance of caution, Respondents address the United States' arguments *infra*, including its mischaracterization of the operation of the ordinance as favoring one type of speech over another. As a matter of fundamental fairness and Supreme Court procedure, however, this Court's inquiry should rightly be limited to a determination of whether the ordinance is subject to strict scrutiny. Because it is not (as argued herein), the judgment below should be affirmed on that question.

IV. GILBERT'S CODE SATISFIES THE INTERMEDIATE SCRUTINY TEST

If the Court reaches the application of the intermediate scrutiny test, the ordinance should be upheld.

Under that test, an ordinance is upheld if it is "narrowly tailored to serve a significant governmental interest" and "leaves open ample alternative channels of communication." *McCullen*, 134 S. Ct. at 2534, 2540 n.9 (internal quotation marks omitted). An ordinance is narrowly tailored "so long as the regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." *Ward*, 491 U.S. at 799 (alteration in original).

Petitioners' *sole* reference to the application of the intermediate scrutiny test is a conclusion that distinctions among temporary signs in the ordinance "bear no relation whatsoever" to Gilbert's interests. They posit that Gilbert should treat "all temporary signs the same." (Pet'rs' Br. 53.) In support, they cite *Discovery Network*, where Cincinnati had sought to ban commercial handbills from newsracks in favor of "traditional newspapers." As discussed *supra*, this Court applied the *Central Hudson* test to conclude that Cincinnati's interest in limiting the number of newsracks was not justified by regulating the content of the publications. *Discovery Network*, 507 U.S. at 428. The instant case is a far cry from the restriction in *Discovery Network*. Because newsracks themselves are not speech, regulation of their content necessarily favors views and ideas. In contrast, Gilbert regulates Temporary Directional Signs without regard to views and ideas, as explained in the preceding portions of this brief.

The remainder of Petitioners' scrutiny arguments are under the rubric of the strict scrutiny test, where they contend that: (1) Gilbert cannot distinguish its interests in regulating Temporary Directional Signs differently from Ideological Signs and Political Signs; and (2) Gilbert gives more favorable treatment to directions permitted under the provisions for Homeowners Association Facilities Temporary Signs under Section 4.406(C)(4) (App. 54) ("HOA Signs") and Weekend Directional Signs under Section 4.405(B)(2) (App. 51-54).[13] (Pet'rs' Br. 47-52.) These conclusions lack factual support under any scrutiny analysis.

Petitioners do not (and could not) deny the legitimacy of Gilbert's interest in avoiding the proliferation of signs that adversely affect the quality of life, safety of citizens, and property values. *Members of City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 817 (1984).[14] *See also Bd. of Trs. of State Univ. of N.Y.*, 492 U.S. 469, 478 (1989) (noting that courts are "loath to second guess the Government's judgment" that a regulation is necessary to further its legitimate interests). Nevertheless, and while not articulated by Petitioners, their comparative analysis suggests that Gilbert has (paradoxically) not banned *enough* speech. In fact, the Town's treatment of signs supports the distinctions in the ordinance.

---

[13] Because Section 4.405(B)(2) applies to new residential construction only (App. 52), Respondents will refer to them as "Builder Weekend Directional Signs."

[14] Gilbert's interests are enumerated in Section 4.401 of the ordinance. (App. 25-27.)

A. The Distinctions Are Narrowly Tailored To Advance Significant Governmental Interests

The provision for Temporary Directional Signs is intended to guide motorists and pedestrians to a specific location for a time-limited event. The durational restrictions serve to minimize visual clutter and confusion for people traveling to an event that has already concluded. The expressive features of Petitioners' signs, meanwhile, can be communicated through Ideological Signs, which Petitioners consider to have the most favorable treatment.[15] Ideological Signs and Political Signs, moreover, retain expressive value even if they pertain to a specific event because of the identity of the speaker as a supporter of a political perspective or a specific ideology. These signs do not have the same potential to confuse travelers,

---

[15] Respondents note that although the Ninth Circuit assumed that Ideological Signs are allowed in the right of way, the district court did not resolve that issue (Pet. App. 74a) and, indeed, Section 4.402(R)(7) provides otherwise. (App. 41.) Among other things, the 2008 ordinance provides setback requirements for signs that are allowed in the right of way (*e.g.*, App. 32, 36, 45-46, 53-54), whereas no such provision applies to Ideological Signs. Moreover, under the 2011 amendment, Temporary Directional Signs are now permitted in the right of way. (App. 80, 88-89.) For these reasons, if the location of signs in the right of way is relevant to the Court's analysis, a remand may be warranted for the proper application to be resolved by the lower court. A remand would be warranted as well if a severability question arises. (App. 78; *see Virginia v. Hicks*, 539 U.S. 113, 121 (2003) (severability presents a question of state law.)

because the messages are not coupled with guidance to a specific location for a time-sensitive event.

In addition, Gilbert does not fully control the regulation of signs within its borders. For example, Arizona law *requires* that towns such as Gilbert allow certain types of political signs to be posted in Gilbert's rights of way during certain periods of time prior to a primary election. Ariz. Rev. Stat. § 16-1019. Another example is *Linmark Assocs., Inc. v. Township of Willingboro*, 431 U.S. 85 (1977), which affords constitutional protection to signs advertising the sale of real estate. The fact that Gilbert must comply with these external obligations should not logically require Gilbert to allow identical exceptions for all manner of speech.

Instead, by limiting the number, size and location of signs, Gilbert's ordinance directly addresses the source of the "evil" created by a proliferation of signs – visual blight, safety and deterioration of real estate values. *Ward*, 491 U.S. at 800; *Vincent*, 466 U.S. at 808. Without the ordinance, Gilbert's important governmental interests would be substantially impaired and would "be achieved less effectively." *Ward*, 491 U.S. at 799. The validity of the ordinance "depends on the relation it bears to the overall problem the government seeks to correct, not on the extent to which it furthers the government's interests in an individual case." *Id.* at 801. The distinctions are justified with respect to the function of the signs, all of which are furthered by Gilbert's comprehensive sign regulations.

The United States' arguments addressing the issue of the differing treatment of Petitioners' Temporary Directional Signs and Political and Ideological Signs (United States Amicus Br. 28-31) is no more persuasive than Petitioners'. First, the United States adopts the same fallacy that Petitioners do in implying that Petitioners' Temporary Directional Signs are the only medium available to advertise Petitioners' church services. To the contrary, under the ordinance, Petitioners are free to advertise their events through Ideological Signs. What they cannot do through Ideological Signs is include information that is intended to guide drivers to the location of the church service or event. Those additional limited-purpose signs must comply with the regulations of Temporary Directional Signs.

The United States also misses the mark by contending that the Temporary Directional Signs provision does not serve the purposes for which the ordinance was adopted. To the contrary, allowing additional signs to guide travelers to a specific event improves traffic flow and reduces congestion. Limiting the signs to reasonable hours of travel to Petitioners' location, and requiring them to be smaller and less obtrusive than Ideological Signs, serves the legitimate interests of preventing confusion by travelers, reducing the proliferation of signs, and improving aesthetics, along with the corresponding benefits to the community that result. Properly understood, the interests served by the limitations are functional and no more "value laden" than analogous provisions in other sign laws.

B. Gilbert Does Not Favor HOA Signs Or Builder Weekend Directional Signs Over Temporary Directional Signs

Petitioners' contention that Gilbert favors HOA Signs and Builder Weekend Directional Signs is wholly misplaced for multiple reasons. First, both of these types of signs require permits whereas Temporary Directional Signs do not. (App. 27-30, 51-52.) The requirement of a permit sets these signs apart from the treatment of Temporary Directional Signs that do not require a permit. Second, while there is no limit on the total number of Temporary Directional Signs (other than the placement of four per property), HOA Signs are limited to an aggregate of 80 square feet and Builder Weekend Directional Signs to a total of 15 signs with no more than 5 signs within 500 feet of each other on the same side of the street. (App. 38, 51-54.)

Third, Temporary Directional Signs are not limited as to location, yet HOA Signs are allowed only "within the limits of the residential community," and Builder Weekend Directional Signs must be within a two-mile radius of the property. (*Id.* at 38-39, 51-52, 54.) Fourth, Builder Weekend Directional Signs can be erected on weekends and holidays only, whereas Temporary Directional Signs have no such limitation. (App. 38-39, 51-52.) Fifth, Temporary Directional Signs can be 6 feet high and 6 feet in area, but Builder Weekend Directional Signs are limited to 4 feet high and 3 square feet in area. (App. 38, 51-52.) Sixth, because HOA Signs must be within the residential

community, there is less congestion and potential confusion than Temporary Directional Signs which do not have a geographic restriction.

In sum, the fact that HOA Signs and Builder Weekend Directional Signs require permits, and contain more restrictions than Temporary Directional Signs, belies Petitioners' claim of less favorable treatment. Instead, the regulation is tailored to the function of each sign type, in a manner that accommodates the desired speech while protecting the Town's legitimate governmental interests.

C. Petitioners Have Adequate Alternative Modes Of Communication

The final prong of the intermediate scrutiny analysis is that there exist adequate alternative modes of communications. *Vincent*, 466 U.S. at 812. Petitioners do not claim the alternatives are inadequate, nor is there evidence in the record that *any* person could not find a Good News service because of a lack of signage.

As in *Vincent*, this Court should find that adequate alternatives to Temporary Directional Signs exist for Petitioners. First and foremost, Petitioners are free to use Ideological Signs that Petitioners themselves admit offer *more* opportunities to convey messages. Indeed, Petitioners have utilized a whole host of avenues to spread the word about their mission and location, including the internet, print advertising, personal solicitations, pamphlets, telephone calls

and emails. (ER 655-56, 658-59, 665-66; SER 67-68, 71-72, 75.) Likewise, the ordinance permits Petitioners to utilize on-site A-Frame Signs and off-site Sign Walkers, neither of which require a permit. (App. 29-30, 45-46.) Accordingly, Petitioners have *more* than ample alternative modes of communication apart from Temporary Directional Signs under the ordinance.

CONCLUSION

When Petitioners' arguments are reduced to their essentials, they contend that Gilbert abridged their freedom of speech by regulating the ability to post off-site directional signs for temporary events differently from other types of signs. To make this argument within the framework of the case law, Petitioners rephrase their signs as "invitations" to religious events, without which they cannot fulfill their mission to spread their message. Based on that premise, Petitioners contend that the distinctions in the ordinance for Temporary Directional Signs are based on content that should have been reviewed under the strict scrutiny standard.

Petitioners' arguments go too far. First, the Temporary Directional Sign provision does not foreclose Petitioners' ability to invite the public to church events. It simply (and solely) applies to limit their ability to erect off-site signs intended to direct passersby to temporary events. Second, the "content-neutrality" test has been devised as a tool to guide

the courts to the appropriate level of scrutiny. The strict scrutiny test, in turn, is the most searching inquiry, intended to prevent governments from censoring or favoring viewpoints or ideas within the realm of noncommercial speech.

Because all signs are forms of speech, any distinctions among them could be based on their content, depending on the rigidity with which that term is construed. At the same time, sign ordinances are necessary to advance legitimate governmental interests such as aesthetics, safety and maintaining property values. Particularly in the area of sign ordinances, therefore, the content-neutrality test should be applied flexibly with special consideration given to whether the ordinance censors or favors either viewpoints or ideas. The strict scrutiny test is misplaced here because the Temporary Directional Sign provision, along with other exceptions from the permitting requirement, does not discriminate as to viewpoints or ideas.

Petitioners have not sought review of the Ninth Circuit's *application* of the intermediate scrutiny test, but solely whether the lower court should have applied that test at all. If the Court agrees that intermediate scrutiny applies, its inquiry is therefore at an end. Should the Court revisit the Ninth Circuit's application of that test, it should likewise affirm for the reasons provided herein.

WHEREFORE, the judgment below should be AFFIRMED.

Respectfully submitted,

PHILIP W. SAVRIN
Counsel of Record
DANA K. MAINE
WILLIAM H. BUECHNER, JR.
FREEMAN MATHIS & GARY, LLP
100 Galleria Parkway
Suite 1600
Atlanta, GA 30339
(770) 818-1405
psavrin@fmglaw.com

REPLY BRIEF

Supreme Court, U.S.
FILED
DEC 15 2014
OFFICE OF THE CLERK

No. 13-502

IN THE

Supreme Court of the United States

PASTOR CLYDE REED AND GOOD NEWS COMMUNITY CHURCH,

Petitioners,

v.

TOWN OF GILBERT, ARIZONA; AND ADAM ADAMS, IN HIS OFFICIAL CAPACITY AS CODE COMPLIANCE MANAGER,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONERS' REPLY BRIEF

Kevin H. Theriot
Jeremy D. Tedesco
Alliance Defending Freedom
15100 N. 90th Street
Scottsdale, AZ 85260
(480) 444-0020

David A. Cortman
Counsel of Record
Rory T. Gray
Alliance Defending Freedom
1000 Hurricane Shoals Rd.
N.E., Ste. D-1100
Lawrenceville, GA 30043
dcortman@alliance
defendingfreedom.org
(770) 339-0774

Counsel for Petitioners

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners are Good News Community Church and its pastor, Clyde Reed (hereinafter collectively "Good News" or "the Church"). Respondents are the Town of Gilbert, Arizona, and Adam Adams in his official capacity as the Town's Code Compliance Manager (hereinafter collectively "Gilbert").

Good News Community Church does not have any parent companies, and no entity has any ownership interest in it.

TABLE OF CONTENTS

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT i

TABLE OF AUTHORITIES iv

INTRODUCTION 1

ARGUMENT 4

I. Respondents Favor A Subjective Test. 4

A. Respondents' Test Determines Content Neutrality Solely Based On The Government's Motive Or Purpose Rather Than A Law's Text. 4

B. Respondents' New Test Authorizes The Government To Make Value Judgments About Speech. 8

II. Respondents' Justifications For Their Novel Test Are Unavailing. 9

A. That "Signs Are Speech" Is A Reason To Ensure First Amendment Compliance, Not Grant Government A License To Regulate At Its Whim. 9

B. The Objective Test Will Not Spell The Demise Of Sign Regulations. 11

C. Secondary Effects Caselaw Is Inapposite. 13

D. Respondents Misread *Metromedia*. 14

E. Respondents Fail to Distinguish This Court's Many Cases Striking Down Regulations That Were Content-Based On Their Face..... 16

III. Respondents' Code Cannot Withstand Any Level Of Scrutiny..... 19

A. Strict Scrutiny Applies To Respondents' Sign Code..... 19

B. Respondents' Sign Code Fails Even Intermediate Scrutiny..... 20

1. The Code Is Not Narrowly Tailored..... 21

2. Ample Alternative Channels for Communication Do Not Exist..... 24

CONCLUSION..... 25

TABLE OF AUTHORITIES

***Cases*:**

Brown v. Entertainment Merchants Association,
131 S. Ct. 2729 (2011) 19

City of Cincinnati v. Discovery Network,
507 U.S. 429 (1993) ..... passim

City of Ladue v. Gilleo,
512 U.S. 43 (1994) 25

City of Los Angeles v. Alameda Books, Inc.,
535 U.S. 425 (2002) 14

Consolidated Edison Co. of New York. v. Public Service Commission,
447 U.S. 530 (1980) 18, 24

Frisby v. Schultz,
487 U.S. 474 (1988) 21

Holder v. Humanitarian Law Project,
561 U.S. 1 (2010) 8

Linmark Associates, Inc. v. Willingboro Township,
431 U.S. 85 (1977) 25

Matthews v. Town of Needham,
764 F.2d 58 (1st Cir. 1985) 4

McCullen v. Coakley,
134 S. Ct. 2518 (2014) 6, 12, 19

Metromedia, Inc. v. City of San Diego,
453 U.S. 490 (1981).....10, 14-17

Police Department of City of Chicago v. Mosley,
408 U.S. 92 (1972).....17

R.A.V. v. City of St. Paul,
505 U.S 377 (1992).....7

Renton v. Playtime Theaters, Inc.,
475 U.S. 41 (1986).....14

Rosenberger v. Rector & Visitors of University of Virginia,
515 U.S. 819 (1995).....18

Simon & Schuster v. Members of New York State Crime Victims Board,
502 U.S. 105 (1991).....6

Turner Broadcasting System, Inc. v. FCC,
512 U.S. 622 (1994).....6

United States v. Stevens,
559 U.S. 460 (2010).....8

Verizon Communications, Inc. v. F.C.C.,
535 U.S. 467 (2002).....20

Ward v. Rock Against Racism,
491 U.S. 781 (1989).....21

INTRODUCTION

The circuit courts are in conflict about whether the government's lack of illicit motive, or content-neutral regulatory purpose, nullifies content-based discrimination on the face of a law. A majority follows the objective test laid down by this Court decades ago, under which a content-based motive or purpose is sufficient but not necessary to show content-based discrimination. The court below, and two other circuit courts, follows an "evolving," subjective test. This approach requires a free speech litigant to prove that a law facially regulates speech based on content *and* was enacted with an illicit motive or purpose to prevail.

Respondents prefer the latter test, asserting that a lack of discriminatory intent, or a content-neutral purpose, should result in the application of intermediate scrutiny, even if a law facially classifies speech based on content. Resp. Br. 17-18. They posit this new test is necessary to give them the "flexibility" to "balance" the "fundamental right to speak" with the "interests of [their] particular jurisdiction." Resp. Br. 17; *see also id.* at 8, 22, 37.

Contrary to Respondents' claims, applying this Court's objective test to sign codes does not impede the "flexibility" they claim they need. It permits them to regulate signs' location, placement, physical attributes, number, and much more, but requires they do so in a content-neutral manner. *See, e.g.*, Nat'l League of Cities *Amici* Br. in Supp. of Resp. (Nat'l League) 10, 13, 15 (explaining many content-neutral ways to regulate signs).

What Respondents' new test actually does is give them license to classify noncommercial speech based on content, which is forbidden by the First Amendment. Worse, Respondents candidly admit that their test allows them to more heavily regulate—even eliminate—noncommercial speech they view as less important. They explain that Political and Ideological Signs receive favorable treatment because they "retain expressive value even if they pertain to a specific event because of the identity of the speaker as a supporter of a political perspective or a specific ideology." Resp. Br. 48.

After Gilbert classifying Good News' signs for the past seven years as event directional signs, App. 123-126, Respondents for the first time in this Court assert that Good News' signs are ideological. Resp. Br. 4, 24. Yet Respondents contend that they can be "banned ... altogether" because they also include directional content. Resp. Br. 31. But if the Church removed the directional content, they would be banned because Ideological Signs are prohibited on public property. Resp. Br. 48 n.15. Political Signs, however, are still liberally permitted in the right-of-way. Thus, even with their concession that the Church's signs are ideological, the Code is still plainly content based.

Respondents' claim that the Church's ideological signs somehow lose their constitutional protection because they also include directional content is unprecedented. A Political Sign that says "Vote Hillary, Register To Vote One Block Down" does not lose constitutional protection because it contains directional content. Nor does an Ideological Sign

that says "Don't Waste Your Time On Fairy Tales, Skip Good News' Services Sunday at Sunrise Senior Living." The same is true of Good News' signs, whose directional content is merely a component of its invitation for the public to come and hear the Gospel. App. 104. And even without this content the Church's sign would still be prohibited.

Respondents contend they place onerous duration limits on the Church's signs to "minimize visual clutter and confusion for people traveling to an event that has already concluded." Resp. Br. 48. But there are several problems with this contention. First, church services are weekly, so there is no "confusion" with a sign that includes the day, time and location. Second, allowing an unlimited number of political signs obviously does not reduce clutter. Third, why is there no confusion with other directional signs that are up for much longer? App. 54 (HOA events—30 days); App. 52 (builder weekend directional—64 hours). Fourth, Respondents' proposed "solution" of placing two signs (one directional and one ideological), Resp. Br. 4, directly conflicts with the interest in reducing clutter. Even more, these alleged concerns are not unique to signs containing directional content and Respondents may easily address them in a content-neutral way. For instance, they may require the removal of signs that actually cause a traffic hazard or motorist confusion.

Here, the Code's content-based classifications result in Pastor Reed being subjected to potential jail time and criminal fines simply because Gilbert officials place Good News' signs into a disfavored category. ER 156 & 169 ¶ 28.

ARGUMENT

I. Respondents Favor A Subjective Test.

A. Respondents' Test Determines Content Neutrality Solely Based On The Government's Motive Or Purpose Rather Than A Law's Text.

Respondents effectively concede that the Code is content based. At times, they expressly claim the power to make distinctions based on content. Resp. Br. 8 (signs may be regulated based on "what they say"); *id.* at 37 (sign regulations may "distinguish between noncommercial signs").

Other times, they resort to synonyms for content-based discrimination. For example, they claim the Code does not regulate based on content, but rather on signs' different "functions." Resp. Br. 8, 18, 34, 40, 49, 52. But all signs serve the same "function"—conveying ideas and information to the public. Thus "function" is just a pseudonym for "content." *See Matthews v. Town of Needham*, 764 F.2d 58, 60 (1st Cir. 1985) ("[Preferring] the 'functions' of certain signs over those of other (*e.g.*, political) signs is really nothing more than a preference based on content.").

In fact, Respondents concede that "[e]xcept for the directional component, the information Petitioners claim they wish to include could be placed on an Ideological Sign.'" Resp. Br. 4. But everything on the Church's signs is ideological content, from its invitation to attend the Church's

services[1] to where it meets and how to get there. The directional content does not strip Good News' signs of First Amendment protection any more than an arrow pointing toward heaven or the address of a polling place on a Political Sign. And regulating Petitioners' signs differently than Ideological and Political Signs because they contain directional information is blatant content discrimination.

Further, removing the directional content would not solve the Church's dilemma because Respondents say Ideological Signs cannot be placed in the right-of-way and the Church owns no private property on which to place signs. Resp. Br. 48 n. 15. Importantly, other temporary signs, like Political Signs, are permitted in the right-of-way.

Despite the Code's content-based distinctions among noncommercial signs, Respondents claim it passes constitutional muster. Because under their novel test, so long as the government lacks a discriminatory motive, or asserts a content-neutral purpose/justification, intermediate scrutiny applies even if the face of the law regulates speech based on its content. Resp. Br. 16 (strict scrutiny only appropriate where laws "censor or restrain speech *because of* the ideas or viewpoints expressed") (emphasis added); *see also id.* at 17-18 (claiming that

---

[1] Respondents erroneously claim that the Church began referring to its signs as "invitation signs" for the first time before this Court. Resp. Br. 3, 23-24, 53. But the Church has been referring to its signs as "invitations" since the outset of this litigation (App. 104 Compl. ¶ 46) (signs are "an *invitation* for those in the community to attend [its services]") (emphasis added).

intermediate scrutiny applies where the government asserts a content-neutral justification). *Amici* the United States and the National League of Cities proffer the same unprecedented test. United States *Amicus* Br. 12 (a sign regulation, "whether or not it contains content-specific exceptions, should be subject only to intermediate scrutiny when its rationales are limited to the substantial governmental interests in safety and aesthetics"); Nat'l League *Amicus* Br. 29-30 (lack of discriminatory intent or a content-neutral purpose triggers intermediate scrutiny).

Respondents' test directly conflicts with this Court's precedent, which states that "laws that *by their terms* distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 643 (1994) (emphasis added); *see also McCullen v. Coakley*, 134 S. Ct. 2518, 2531 (2014) (finding no constitutional violation because the law at issue did "not draw content-based distinctions *on its face*") (emphasis added). Yet Respondents would treat the *terms* of a law as essentially irrelevant.

Moreover, their new test makes a lack of discriminatory intent or a content-neutral purpose the determinative factor in whether a law is content based. This Court has held exactly the opposite. *See Simon & Schuster v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 117 (1991) (rejecting argument that "discriminatory ... treatment is suspect under the First Amendment only when the legislature intends to suppress certain ideas");

Cincinnati v. Discovery Network, 507 U.S. 429 (1993) (rejecting city's argument that "the test for whether a regulation is content based turns on the 'justification' for the regulation" and instead relying on the text of the ordinance).

For these reasons, Respondents' agreement "that a government's lack of a discriminatory intent cannot render lawful what would otherwise be an unconstitutional infringement of speech" is meaningless. Resp. Br. 6 n.2. Their novel test yields the same result as requiring litigants to prove discriminatory intent. That is because the application of intermediate scrutiny in the vast majority of cases (except rare cases like this one where the code is wildly underinclusive) will cause content-based sign codes to be upheld rather than stricken by courts.

It is therefore Respondents, not Good News, who are "wrench[ing] ... constitutional precepts from their moorings contrary to case law and common sense." Resp. Br. 30. Respondents' new test jettisons the rule that laws are "presumptively invalid" when they facially discriminate based on content in the sign context. *See R.A.V. v. City of St. Paul*, 505 U.S 377, 382 (1992). That represents a sea change in First Amendment law that cannot be limited to signs.

B. Respondents' New Test Authorizes The Government To Make Value Judgments About Speech.

Respondents claim that *United States v. Stevens*, 559 U.S. 460 (2010), and *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010), are distinguishable from this case because they involved speech that the government deemed "harmful." Resp. Br. 33. But the Code makes exactly the same type of subjective value judgments. And the Court's holding in both cases makes clear that the government's rationale or motive, even when altruistic, cannot save a law that is content discriminatory on its face.

Respondents simply make another plea for permission to regulate more heavily speech that it deems less important, a request the Court has repeatedly rejected. *See, e.g.*, *Stevens*, 559 U.S. at 470 (refusing to determine "[w]hether a given category of speech enjoys First Amendment protection [based] upon a categorical balancing of the value of the speech against its societal costs").

For example, they claim that "Ideological Signs and Political Signs ... retain expressive value even if they pertain to a specific event because of the identity of the speaker as a supporter of a political perspective or a specific ideology." Resp. Br. 48. Hence, the Code provides an unlimited duration for Ideological Signs and permits Political Signs virtually all year long. Yet the Code limits the display of the Church's signs to 14 hours, most of which occur at night. Why? Because Respondents think they lack value and could even be "banned ...

altogether," simply because they contain directional content (and without such content the Church's signs are banned in the right of way regardless). Resp. Br. 31. The First Amendment forbids such value judgments.

Critically, Respondents conflictingly assert that the message on Good News' signs, except the directional content, is ideological speech. Resp. Br. 4.[2] Thus, they also "retain expressive value even if they pertain to a specific event." Resp. Br. 48. Moreover, directional content is also ideological speech. No sign, regardless of its content, loses all constitutional protection merely because it includes directional content.

II. Respondents' Justifications For Their Novel Test Are Unavailing.

Respondents offer this Court several reasons why it should adopt their new test for judging content neutrality. None withstand scrutiny.

A. That "Signs Are Speech" Is A Reason To Ensure First Amendment Compliance, Not Grant Government A License To Regulate At Its Whim.

Respondents heavily rely on a reversed Middle District of Florida decision opining that the

---

[2] Although the Church has discussed the category into which Gilbert places its signs, App. 123-26, this is far from an admission that the signs belong in it. Resp. Br. 1. Nor would any such concession matter because the content-based categorization of signs is unconstitutional.

government needs more flexibility to regulate signs "because signs are forms of speech" and thus "can only be categorized, or differentiated, by what they say." Resp. Br. 19-20; *see also id.* at 8, 10, 12, 18, 54 (relying on "signs are forms of speech" refrain).

This is plainly not the case. Respondents fail to appreciate that while "the government has legitimate interests in controlling the noncommunicative aspects of [signs], ... the First and Fourteenth Amendments foreclose a similar interest in controlling the communicative aspects." *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 502 (1981). Accordingly, in *Discovery Network* this Court recognized the city's legitimate interest in reducing the overall number of newsracks because of their negative aesthetic impact, but barred it from pursuing that interest through selective, content-based restrictions. 507 U.S at 429-30.

In addition, the fact that "signs are speech" is a good reason for courts to carefully scrutinize sign regulations under the First Amendment, not provide the government with less oversight and greater authority to restrict speech based on its content. No one would argue that the government should have more leeway regulating handbills or books because they are inherently "forms of speech." This reasoning is just as wrong in the sign context.

Similarly, the fact that Respondents find sign regulation "difficult," Resp. Br. 19, makes the need for a clear and objective test for content neutrality even more important. This Court's longstanding text-based test satisfies that need, as even

Respondents concede that it is "easy-to-apply." Resp. Br. 20. This ease in application will restore much needed uniformity to the lower courts.

B. The Objective Test Will Not Spell The Demise Of Sign Regulations.

Respondents claim that an objective content-neutrality test "would subject virtually *all* sign regulations to strict scrutiny." Resp. Br. 8, 22, 35. But the fact that this Court and a majority of lower courts already apply this Court's longstanding objective test to sign regulations, *see* Pet. 21-22, as well as other mediums of speech, belies any claim that the "sky is falling."

In fact, many of the regulations Respondents claim would be stricken under the objective test are entirely permissible. For instance, Respondents assert that regulations concerning the physical contours of signs and distinctions between permanent and temporary signs would fail. Resp. Br. 22, 35. Not true: the government may permissibly regulate the physical contours of signs, so long as they do not grant certain signs a larger surface area based on what they say, as the Code does here. *See* Pet. Br. 11 (graph showing Gilbert's content-based regulation of sign size).

The government may also permissibly distinguish between temporary and permanent signs. In fact, Respondents' definition of "temporary sign," which is "[a] sign not permanently attached to the ground, a wall or a building, and not designed or intended for permanent display," App. 70, passes the

objective content neutrality test with flying colors. The problem is that Respondents categorize temporary signs based on content and impose different restrictions based on the category into which town officials place each sign.

Respondents also overstate this Court's previous admonitions that a law is content based if it requires enforcement officials to examine the content of speech to enforce it, calling it a "simplistic if-you-have-to-read-it-it-is-content-based" approach. Resp. Br. 35. *See, e.g., McCullen*, 134 S. Ct. at 2531 (a speech regulation is "content based if it require[s] 'enforcement authorities' to 'examine the content of the message that is conveyed to determine whether' a violation has occurred."). But under this test a sign code is not content based merely because it requires officials to look at a sign. Rather, the question is whether a sign's differential treatment is determined based on what the sign says, and that is clearly how Gilbert's Sign Code operates. *See* Pet. Br. 38-40.

Even while decrying the objective content-neutrality test as "game, set, and match for the Nation's sign regulations," Nat'l League *Amicus* Br. 31, the League lists numerous ways in which a city can regulate signs in a content-neutral manner. These methods include: "locational criteria (*e.g.*, off-site signs, number of freestanding signs per lot, spacing, and setbacks), placement criteria (*e.g.*, roof signs, ground signs, wall signs, and projecting signs), physical attributes (*e.g.*, flashing signs, animated signs, revolving signs, and wind-activated sign-

devices), and ... physical or placement criteria (*e.g.*, sign height and size)." *Id.* at 10.

In practice, it is the new test proffered by Respondents that poses the real danger. Respondents assure this Court that "[g]overnments would still not be able to meddle in the marketplace of ideas" under their test, Resp. Br. 37, but the facts of this case amply demonstrate that is not true. *See* Pet. Br. 11-12 (graphs showing Gilbert's preference for Political and other Ideological Signs over Good News' in relation to size and duration).

Merely requiring governments to assert neutral justifications for their laws is no test at all. They always can. For instance, laws regulating signs "are typically premised on the content-neutral rationales of promoting safety and aesthetics." United States *Amicus* Br. 9. What Respondents propose is a test they will meet by default and which provides no meaningful protection of free speech in the sign context. And this test also places other forms of speech at risk because the content-neutrality standard remains the same regardless of whether books, signs, or pamphlets are at issue.

C. Secondary Effects Caselaw Is Inapposite.

Respondents invoke the secondary effects doctrine, and their new test is essentially a radical expansion of that doctrine. Resp. Br. 18, 21, 40 n.12.

The secondary effects doctrine arose in the context of zoning regulations concerning sexually

oriented businesses. *Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986). It permits the government to regulate adult businesses differently because of the *unique* secondary effects of their speech, such as increased crime and lower property values. *See id.* at 48; *see also City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 430 (2002).

The secondary effects doctrine is inapplicable here for the same reason it was rejected in *Discovery Network*: "there [were] no effects attributable to respondent publishers' newsracks that distinguish[ed] them from the newsracks Cincinnati permit[ted] to remain on its sidewalks." 507 U.S. at 430. Similarly, all temporary signs, whether they are Political, Ideological, Qualifying Event, HOA, etc., impact Respondents' interests in safety and aesthetics equally. Hence, Respondents' reliance on the secondary effects doctrine is misplaced.

D. Respondents Misread *Metromedia*.

In support of their new test, Respondents offer an interpretation of *Metromedia* that cannot be squared with the opinions in that case.

Metromedia involved a free speech challenge to a San Diego ordinance that provided various exceptions to a general ban on outdoor billboard advertising. 453 U.S. at 493. The exceptions included, among others, onsite signs, for sale and for lease signs, commemorative historical plaques, religious symbols, certain directional signs, and political campaign signs. *Id.* at 494-95.

Respondents' primary (and mistaken) claim is that "the justices who decided *Metromedia* would likely have reviewed the exceptions under the intermediate scrutiny test had the case been decided with today's standards in mind." Resp. Br. 39. That is demonstrably not the case.

First, Respondents claim that the four-member plurality, who held the ordinance unconstitutional, "did not do so because of the exceptions." Resp. Br. 37. To the contrary, the plurality clearly viewed the billboard exceptions as impermissibly content based. Recognizing that the exceptions "distinguishe[d] in several ways between permissible and impermissible signs at a particular location by reference to their content," the plurality held that "[b]ecause some noncommercial messages may be conveyed on billboards throughout the commercial and industrial zones, San Diego must similarly allow billboards conveying other noncommercial messages throughout those zones." *Metromedia*, 453 U.S. at 515-16.

Respondents also err in their claim that the two concurring justices viewed the ordinance's exceptions to be "content-neutral prohibitions of particular media of communication." Resp. Br. 14 (quoting *Metromedia*, 453 U.S. at 526-27). That quote is actually a description of the concurring justices' interpretation of the ordinance as "a total ban of a medium of communication." *Id.* at 526. In fact, the concurring justices indicated that they were not "decid[ing] ... whether the exceptions to the total ban constitute[d] independent grounds for invalidating the regulation" because they found that the total ban

failed intermediate scrutiny. *Id.* at 532 n.10. They did, however, recognize quite clearly that "[t]o the extent that exceptions rel[ied] on content-based distinctions, they must be scrutinized with special care." *Id.*

In short, *Metromedia* supports the Church's argument that the Code is content based and deserving of strict scrutiny.

E. Respondents Fail to Distinguish This Court's Many Cases Striking Down Regulations That Were Content-Based On Their Face.

To justify upholding the Code under the First Amendment, Respondents either reinvent or eschew this Court's precedent. Indeed, Respondents virtually ignore the vast body of this Court's caselaw demonstrating that the plain text of a law is sufficient to render it content based, relegating most of those decisions to a footnote with no substantive discussion. Resp. Br. 33-34 n.9. And they fail to distinguish the few cases they do discuss.

For example, Respondents claim that the city's restriction on newsracks in *Discovery Network* "had nothing to do with the content they were allowed to contain." Resp. Br. 32. To the contrary, this Court specifically rejected the city's argument that its newsrack regulation was content neutral, holding instead that "whether any particular newsrack falls within the ban is determined by the content of the publication resting inside that newsrack. Thus, by any commonsense understanding of the term, the

ban in this case is 'content based.'" *Discovery Network*, 507 U.S. at 429.

Respondents also attempt to distinguish temporary signs from the newsracks in *Discovery Network*, claiming that the latter "do not in and of themselves convey a message, as their purpose is to allow the dissemination of ideas and speech." Resp. Br. 32. But this is no distinction at all. Temporary signs, like newracks, do not in and of themselves convey a message. They are both modes of disseminating ideas. It is the content of the publications in a newsrack, or the words and symbols on a sign, that convey a message. And signs, unlike newsracks, have a venerable First Amendment history. *See Metromedia*, 453 U.S. at 501 (outdoor signs are "a venerable medium for expressing political, social and commercial ideas [which] have played a prominent role throughout American history, rallying support for political and social causes.") (citation omitted).

Respondents further endeavor to distinguish *Discovery Network*, and *Police Department of City of Chicago v. Mosley*, 408 U.S. 92 (1972), on the basis that the Qualifying Event provision of Gilbert's Code "applies equally to all non-profit organizations regardless of the event to which directions are provided." Resp. Br. 31, 32. There are numerous problems with this argument, many of which are addressed in Petitioners' prior briefing. *See* Pet. Br. 30-33.

Respondents' argument also errs in assuming, as did the Court below, that each content-based

category in the Code should be analyzed in isolation. This approach not only allows Respondents to continue favoring certain arbitrary content-based categories of speech over others, but also treats a restriction on speech as content neutral if it is viewpoint neutral. *See* Pet. Br. 32-33.[3] But "[t]he First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to" regulations that "restrict expression because of its message, its ideas, its subject matter, or its content." *Consol. Edison Co. of N.Y. v. Pub. Serv. Comm'n*, 447 U.S. 530, 537 (1980). Accordingly, the proper analysis, and the only test that ensures the government is not favoring certain speech over others, is to compare how the Code treats all private temporary signs.

Further, this Court's precedent makes clear that the concepts of "content" and "viewpoint" discrimination are distinct, although they overlap. *See Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 830-31 (1995) ("[D]iscrimination against one set of views or ideas is but a subset or particular instance of the more general phenomenon of content discrimination."). Yet Respondents conflate these concepts, repeatedly stating that the Code is content neutral because it does not discriminate on the basis of "the viewpoints or ideas expressed." Resp. Br. 8, 10, 22, 27. While Respondents use the word "ideas" when describing their test, which seemingly refers to content-based discrimination, they wholly fail to explain how the

---

[3] Of course, the Code violates the viewpoint neutrality rule as well. *See* Pet. Br. 33 n.8.

Code is neutral as to a sign's "message, its ideas, its subject matter, or its content." *See McCullen*, 134 S. Ct. at 2529. Instead, they baldly state that the Code does not target "ideas or viewpoints," and perfunctorily assert that this is enough. But more is required to uphold the Code under the First Amendment than *ipse dixit*.

Simply put, accepting Respondents' arguments would effectively eliminate the content neutrality test by allowing the government to satisfy it by showing viewpoint neutrality alone. That standard would wreak havoc not only in the sign context but in other areas of First Amendment jurisprudence as well, including time, place, manner regulations and government speech forums—a serious consequence Respondents fail to address.

III. Respondents' Code Cannot Withstand Any Level Of Scrutiny.

A. Strict Scrutiny Applies To Respondents' Sign Code.

Because the Code is content based on its face, it must satisfy strict scrutiny. *See Brown v. Entm't Merchants Ass'n*, 131 S. Ct. 2729, 2738 (2011) (strict scrutiny applies to regulations that "impose[] a restriction on the content of protected speech"); Pet. Br. 9-13 (discussing the content-based nature of the Code). It must therefore be justified by a compelling interest and narrowly tailored to serve that interest. *Brown*, 131 S. Ct. at 2738.

Respondents effectively concede that the Code cannot survive this test. They never argue that it serves a compelling interest or is narrowly tailored to such an interest. Consequently, the Court should apply, and find that the Code fails, strict scrutiny. *See* Pet. Br. 47-53 (demonstrating the Code fails strict scrutiny).

B. Respondents' Sign Code Fails Even Intermediate Scrutiny.

Respondents oddly claim that they will be prejudiced if this Court decides whether the Code passes intermediate scrutiny. Resp. Br. 43. Yet that standard is the linchpin of Respondents' defense and their *entire brief* argues that the Code satisfies it. In fact, Respondents have made intermediate scrutiny the cornerstone of their defense in every court below. Consequently, prejudice is not a factor here. Moreover, because Respondents pressed intermediate scrutiny below and the lower courts ruled upon it, this Court may do likewise. *Verizon Commc'ns, Inc. v. F.C.C.*, 535 U.S. 467, 530 (2002) (explaining this Court may review "[a]ny issue 'pressed or passed upon below' by a federal court.") (citation omitted).

Respondents also wrongly claim that the Question Presented does not fairly include whether the Code passes intermediate scrutiny. Resp. Br. 7, 41-42. In fact, Petitioners' Question Presented asks whether the Town's mere assertion of a lack of discriminatory motive "justif[ies] the code's differential treatment of [their] religious signs"

regardless of what level of scrutiny applies. Pet. Br. i.

Under intermediate scrutiny, the Code must be content neutral, narrowly tailored to serve a significant governmental interest, and leave open ample alternative channels for communication. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). But Respondents' Code stumbles right out of the gate because it is content based on its face, and also fails several other prongs of the test.

1. The Code Is Not Narrowly Tailored.

Respondents contend that "by limiting the number, size and location of signs, [the Code] directly addresses the source of the 'evil' created by a proliferation of signs—visual blight, safety and deterioration of real estate values." Resp. Br. 49. Governments may, of course, regulate sign size, location, and number, in a content-neutral manner. But the Code plays favorites among temporary signs based on their content. Further, far from "target[ing] and eliminat[ing] no more than the exact source of the 'evil' it seeks to remedy," *Frisby v. Schultz*, 487 U.S. 474, 485 (1988), the Code allows one of the main sources of that "evil" (*i.e.*, political signs) to proliferate virtually year round. ER 87-120, 194-218 (pictures of Political Signs).

Respondents complain that state law requires them to permit political signs for extended periods of time surrounding elections. Resp. Br. 49. But prior to this state law's enactment, the Code applied an even more favorable duration limit to the Political

Sign category than the new law—*i.e.*, *no duration limit at all* prior to an election. App. 31-32. Respondents also complain that they should not have to provide other signs the same time frame as state law allows political signs, but the First Amendment and the Supremacy Clause mandate that all other temporary, noncommercial signs be accorded the same treatment.

Respondents also make the remarkable claim that placing *more* signs is the answer to Petitioner's complaints. Indeed, they assert that "Petitioners are free to advertise their events through Ideological Signs. What they cannot do through Ideological Signs is include information that is intended to guide drivers to the location of the church service or event. Those additional limited-purpose signs must comply with the regulations of Temporary Directional Signs." Resp. Br. 50.

Common sense dictates that permitting *more* signs does not serve to reduce sign proliferation, prevent confusion, increase safety, and improve aesthetics. Resp. Br. 26, 48-50. Further, Respondents "more signs" solution, along with their highly favorable treatment of Political and other Ideological Signs which substantially impact their interests in the same way, demonstrates that they are not serious about pursuing these interests. Moreover, Respondents' "more signs" argument means no signs for the Church because they claim Ideological Signs are barred within the right-of-way and the Church owns no property on which to place signs.

Respondents also contend that placing onerous durational restrictions on the Church's signs "serve[s] to minimize visual clutter and confusion for people traveling to an event that has already concluded." Resp. Br. 48. But this concern is not unique to signs containing directional content and can easily be regulated in a content-neutral manner. The Code already regulates signs that impact traffic concerns, like signs with moving parts, flashing, blinking, or animated signs, and signs incorporating inflatable objects, in a content-neutral manner. App. 39-42, §4.402(R). Respondents could easily add a content-neutral provision to this section that addresses their visual clutter and confusion concerns. But instead, they pursue this interest through selective, content-based regulations.

In addition, no valid concern exists that the Church's signs will confuse the public because they relate to a finished event. The Church's services occur *every Sunday*. Respondents' confusion and clutter concerns also cannot be taken seriously given that the Code allows other *single* event signs to stand for a month or more, including HOA signs and Political Signs.

Finally, Respondents argue that they do not favor HOA and Builder Weekend Directional Signs over the Church's signs because these signs require a permit. But the record shows that these permits come cheap. ER 310 at 38:20-39:4; ER 328. And permits for Builder Signs containing commercial speech are rubber-stamped, year-long, and easily-renewable. ER 372-491; App. 52. If the option were available, Petitioners would readily apply for a

permit in exchange for this preferable treatment. ER 185-86 at ¶ 48.

Respondents also claim that HOA Signs are treated worse in relation to size and location. Resp. Br. 51. But HOA Signs can be up to 80 square feet, as compared to the Church's 6 sq. ft. signs. And although HOAs are "limited" to 80 sq. ft. "within the limits of the residential community," App. 54, the "Placement" provision of the HOA section of the Code contains no "residential community" limit at all, App. 55. As to Builder Signs, they may advertise a weekend event for 64 hours while the Church gets a mere 14 hours. App. 38, 52, 93.

In the end, Respondents' arguments about HOA and Builder Signs do not show the Code is narrowly tailored, but rather illustrate its intractably content-based nature.

2. Ample Alternative Channels for Communication Do Not Exist.

Respondents repeatedly claim that Good News can use the internet, personal solicitations, pamphlets, telephone calls, emails, and newspaper ads to advertise its services. Resp. Br. 25, 52. But this Court has "consistently rejected the suggestion that a government may justify a content-based prohibition by showing that speakers have alternative means of expression." *Consol. Edison*, 447 U.S. at 541 n.10. Moreover, Respondents do not ask Political or other favored Ideological speakers to use these alternative methods in place of their signs.

Respondents also proffer that the Church can use A-Frame Signs and Sign Walkers to advertise its services. But the A-Frame provision of the Code is limited to commercial businesses. App. 34. Indeed, the Code provision that allows any permitted sign to contain a noncommercial message only allows a commercial business to include a noncommercial message. It does not allow the Church to use A-Frame signs. Further, both of these sign types may only be displayed during business hours, App. 35, 47, which for the Church is the one hour during which it conducts services.

Contrary to Respondents' suggestion, Good News has always claimed that "alternatives [to signage] are inadequate." Resp. Br. 52. Indeed, the Church provided thorough discovery responses explaining their inadequacy. ER 647-60. *Cf. City of Ladue v. Gilleo*, 512 U.S. 43, 57, (1994) ("Residential signs are an unusually cheap and convenient form of communication."); *Linmark Associates, Inc. v. Willingboro Twp.*, 431 U.S. 85, 93 (1977) (alternatives to for sale signs "involve more cost and less autonomy" and thus "are far from satisfactory"). Pastor Reed also testified that signs are an essential means to invite people to the Church's services, and that the Church had more visitors when it was allowed to place more signs. ER 505 at 47:17-22; ER 882 ¶¶ 9-10.

CONCLUSION

This Court should reverse the judgment of the court of appeals.

Respectfully submitted,

Kevin H. Theriot
Jeremy D. Tedesco
Alliance Defending Freedom
15100 N. 90th Street
Scottsdale, AZ 85260
(480) 444-0020

David A. Cortman
Counsel of Record
Rory T. Gray
Alliance Defending Freedom
1000 Hurricane Shoals Rd. N.E., Ste. D-1100
Lawrenceville, GA 30043
dcortman@alliance defendingfreedom.org
(770) 339-0774

December 15, 2014

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
SEP 2 2 2014
OFFICE OF THE CLERK

No. 13-502

In the Supreme Court of the United States

CLYDE REED, ET AL., PETITIONERS

v.

TOWN OF GILBERT, ARIZONA, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRUICT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

KATHRYN B. THOMSON
General Counsel
PAUL M. GEIER
Assistant General Counsel for Litigation
PETER J. PLOCKI
Deputy Assistant General Counsel for Litigation
CHRISTOPHER S. PERRY
Senior Trial Attorney
Department of Transportation
Washington, D.C. 20590

ROBERT J. BLACK
Senior Attorney
Federal Highway Administration
Washington, D.C. 20590

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
JOYCE R. BRANDA
Acting Assistant Attorney General
IAN HEATH GERSHENGORN
Deputy Solicitor General
ERIC J. FEIGIN
Assistant to the Solicitor General
MICHAEL S. RAAB
LINDSEY POWELL
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether respondents' sign ordinance, which imposes more stringent limitations on certain "temporary directional signs" than it imposes on "ideological" or "political" signs, violates the First Amendment.

TABLE OF CONTENTS

Page

Interest of the United States 1
Statement 2
Summary of argument 7
Argument 11
I. A sign regulation premised solely on safety and aesthetics should be subject to intermediate scrutiny 12
A. This Court has taken a context-dependent approach in determining whether to label a law content-neutral and apply intermediate scrutiny 13
B. Intermediate scrutiny is appropriate when the rationales advanced for a sign-regulation scheme are limited to safety and aesthetics 20
II. Respondents' sign ordinance fails intermediate scrutiny, but the Highway Beautification Act would not 28
A. Respondents' differential treatment of temporary directional signs does not meaningfully advance interests in safety and aesthetics 28
B. The Highway Beautification Act is an example of a constitutional scheme of sign regulation 31
Conclusion 34

TABLE OF AUTHORITIES

Cases:

Arkansas Writers' Project, Inc. v. *Ragland*, 481 U.S. 221 (1987) 17
Bartnicki v. *Vopper*, 532 U.S. 514 (2001) 16
Carey v. *Brown*, 447 U.S. 455 (1980) 7, 16, 17, 30
Christian Legal Soc'y Chapter v. *Martinez*, 130 S. Ct. 2971 (2010) 18

Cases—Continued: Page

City of Cincinnati v. *Discovery Network, Inc.*, 507 U.S. 410 (1992) ..... *passim*
City of Erie v. *Pap's A.M.*, 529 U.S. 277 (2000) 18
City of Ladue v. *Gilleo*, 512 U.S. 43 (1994) ..... *passim*
City of L.A. v. *Alameda Books, Inc.*, 535 U.S. 425 (2002) 13, 18, 19
City of Renton v. *Playtime Theatres, Inc.*, 475 U.S. 41 (1986) 9, 18, 19, 32
Clark v. *Community for Creative Non-Violence*, 468 U.S. 288 (1984) 15
Consolidated Edison Co. of N.Y., Inc. v. *Public Serv. Comm'n*, 447 U.S. 530 (1980) 15, 25
First Nat'l Bank v. *Bellotti*, 435 U.S. 765 (1978) 25
Frisby v. *Schultz*, 487 U.S. 474 (1988) 16
Heffron v. *International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981) 16
Holder v. *Humanitarian Law Project*, 561 U.S. 1 (2010) 12
Kovacs v. *Cooper*, 336 U.S. 77 (1949) 17
Linmark Assocs., Inc. v. *Willingboro Twp.*, 431 U.S. 85 (1977) 27
McCullen v. *Coakley*, 134 S. Ct. 2518 (2014) 12, 18, 27, 28
McIntyre v. *Ohio Elections Comm'n*, 514 U.S. 334 (1995) 15
Members of the City Council v. *Taxpayers for Vincent*, 466 U.S. 789 (1983) 21, 24, 25, 26, 31
Metromedia, Inc. v. *City of San Diego*, 453 U.S. 490 (1980) 17, 21, 22, 23, 30, 30
Police Dep't v. *Mosley*, 408 U.S. 92 (1972) 7, 19
R.A.V. v. *City of St. Paul*, 505 U.S. 377 (1992) 25
Republican Party v. *White*, 536 U.S. 765 (2002) 15

Cases—Continued: Page

Riley v. *National Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781 (1988) 27
Simon & Schuster, Inc. v. *Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105 (1991) 14
Turner Broad. Sys., Inc. v. *FCC*, 512 U.S. 622 (1994) ..... *passim*
Virginia State Bd. of Pharmacy v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) 19
Ward v. *Rock Against Racism*, 491 U.S. 781 (1989) ..... *passim*

Constitution and statutes:

U.S. Const.:
Amend. I ..... *passim*
Free Speech Clause 11
Amend. XIV (Equal Protection Clause) 30
Highway Beautification Act of 1965, Pub. L. No. 89-285, § 101, 79 Stat. 1028 (23 U.S.C. 131) 1, 2
23 U.S.C. 131(a) 2, 32
23 U.S.C. 131(b) 2
23 U.S.C. 131(c) 3, 32
23 U.S.C. 131(c)-(d) 32
23 U.S.C. 131(c)(1) 32
23 U.S.C. 131(c)(2)-(3) 32
23 U.S.C. 131(c)(4) 33
23 U.S.C. 131(c)(5) 33
23 U.S.C. 131(d) 3
23 U.S.C. 131(f) 3, 32
23 U.S.C. 131(*o*) 3, 32
23 U.S.C. 131(s) 3
23 U.S.C. 131(t) 2

Statutes—Continued: Page

Gilbert, Ariz., Land Development Code (2008):
§ 4.401 4
§ 4.402(A) 4
§ 4.402(D) 4
§ 4.402(D)(7) 4
§ 4.402(D)(8) 4
§ 4.402(D)(15) 5
§ 4.402(I) 4, 29
§ 4.402(J) 4, 29
§ 4.402(P)(1)-(2) 29
§ 4.402(P)(1)-(3) 5
§ 4.402(P)(3) 29

Miscellaneous:

Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. Chi. L. Rev. 413 (1996) 14, 27

In the Supreme Court of the United States

No. 13-502

CLYDE REED, ET AL. PETITIONERS

v.

TOWN OF GILBERT, ARIZONA, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRUICT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF THE UNITED STATES

This case presents the question whether a particular municipal sign ordinance, which differentiates between certain types of noncommercial signs, is consistent with the First Amendment. The United States has a substantial interest in the resolution of issues concerning the constitutional limits on sign regulation. The Department of Transportation, for example, implements the Highway Beautification Act of 1965, Pub. L. No. 89-285, § 101, 79 Stat. 1028 (23 U.S.C. 131), which encourages States to limit signs along certain major highways in the interest of promoting highway safety and preserving natural beauty. Although the ordinance at issue here differs in significant respects from that Act, the analysis that the

Court adopts in this case may have ramifications for that Act and other federal regulation.

STATEMENT

1. The display of signs has long been subject to regulation on the federal, state, and local levels. The Highway Beautification Act of 1965, Pub. L. No. 89-285, § 101, 79 Stat. 1028 (23 U.S.C. 131), for example, imposes certain limitations on signs near particular federally funded highways, in order "to protect the public investment in * * * highways, to promote the safety and recreational value of public travel, and to preserve natural beauty." 23 U.S.C. 131(a). The Act conditions ten percent of a State's federal highway funds on the State's "effective control of the erection and maintenance * * * of outdoor advertising signs, displays, and devices" in designated areas. 23 U.S.C. 131(b). In consultation with the federal Department of Transportation, every State has enacted sign controls that comply with the Act.

As a general matter, the Act addresses only signs visible from and within 660 feet of Interstate or "primary system" highways, with signs outside that area generally subject to regulation only if they are in nonurban areas and were "erected with the purpose of their message being read from [the] main traveled way." 23 U.S.C. 131(b); see 23 U.S.C. 131(t) (defining "primary system" highways). Thus, the Act does not provide for state regulation of very small signs or signs that are not visible from a regulated roadway. Within regulated areas that are not designated by the State as industrial or commercial, the Act limits signs to (1) "directional and official" signs; (2) signs "advertising the sale or lease of property upon which they are located"; (3) signs "advertising activities conduct-

ed on the property on which they are located"; (4) landmark signs, or signs of "historic or artistic significance the preservation of which would be consistent with the purposes of" the Act; and (5) signs "advertising the distribution by nonprofit organizations of free coffee." 23 U.S.C. 131(c); see 23 U.S.C. 131(d) (allowing States to enter into customized agreements with the federal government about sign regulation in industrial and commercial areas); see also 23 U.S.C. 131(s) (specialized restrictions for designated scenic byways). The Act additionally provides for the designation of fixed locations for signs "giving specific information in the interest of the traveling public." 23 U.S.C. 131(f); see 23 U.S.C. 131(*o*) (grandfather clause for certain signs that "provide directional information about goods and services in the interest of the traveling public").

2. This case concerns a municipal sign ordinance, enacted by the Town of Gilbert, Arizona, that is unrelated to the federal Highway Beautification Act and differs significantly from that Act in its scope, operation, and authorization for various types of signs.* The asserted purposes of the ordinance are to "assure proper and efficient expression through visual communications involving signs compatible with the character and environment of the Town; to eliminate confusing, distracting, and unsafe signs; and to enhance the visual environment of the Town." Pet. App. 142a

---

* Although the Gilbert municipal ordinance was amended during the pendency of this appeal, the government agrees with the court of appeals that the 2008 version of the sign ordinance remains subject to judicial review. See Pet. App. 17a-20a. This brief will accordingly cite that version of the ordinance, although it will focus on provisions that have not meaningfully changed.

(Gilbert, Ariz., Land Development Code (GLDC) § 4.401 (2008)). The ordinance generally requires anyone who wishes to post a sign within town limits to obtain a permit. *Id.* at 144a (GLDC § 4.402(A)). The ordinance contains numerous exceptions to that permit requirement for specific types of signs, *id.* at 144a-147a (GLDC § 4.402(D)), three of which are particularly relevant here:

- *"Ideological Signs."* These are defined as signs "communicating a message or ideas for noncommercial purposes" that do not fall into one of several more specific categories. Pet. App. 153a-154a. The only restriction on such signs is that they "be no greater than 20 square feet in area and 6 feet in height." *Id.* at 145a (GLDC § 4.402(D)(8)), 148a (GLDC § 4.402(J)).
- *"Political Signs."* These are defined as signs that "support[] candidates for office or urge[] action on any other matter" on a national, state, or local ballot. Pet. App. 154a. Such signs may be up to 16 square feet (on residential property) or 32 square feet (on nonresidential property) in size; may be up to six feet in height; may remain in place for several days after the election; and are not generally limited in number. *Id.* at 145a (GLDC § 4.402(D)(7)), 147a (GLDC § 4.402(I)).
- *"Temporary Directional Signs Relating To a Qualifying Event."* These are defined as signs "not permanently attached to the ground, a wall or a building, and not designed or intended for permanent display," that are "intended to direct pedestrians, motorists, and other passersby" to "any assembly, gathering, activity, or meeting sponsored, arranged or promoted by a religious, chari-

table, community service, educational, or other similar non-profit organization." Pet. App. 154a. Such signs may be "no greater than 6 feet in height and 6 square feet in area"; no more than four such signs "may be displayed on a single property at any time"; and such signs may be displayed only "12 hours before, during, and 1 hour after" the event. *Id.* at 146a (GLDC § 4.402(D)(15)), 148a-149a (GLDC § 4.402(P)(1)-(3)).

3. Petitioners are a small church in Gilbert and its pastor. Pet. App. 3a-4a. In accordance with their religious belief that they should "reach[] out to the community to meet on a regular basis," petitioners displayed directional signs near their place of worship (an elementary school in Gilbert) advertising the time and location of their services. *Id.* at 5a. The town and its code compliance manager, respondents here, treated the signs as temporary directional signs under the town ordinance and sought to enforce the restrictions applicable to such signs. *Id.* at 5a-7a.

Petitioners filed suit challenging the ordinance on the ground, *inter alia*, that it unconstitutionally restricted speech. Pet. App. 8a. The district court denied a preliminary injunction. *Id.* at 117a-140a. It believed that a restriction on temporary directional signs was inherently a "content-neutral" regulation subject only to an "intermediate level of scrutiny," and that respondents' limitations on such signs were not excessive. *Id.* at 126a-140a; see *id.* at 135a-138a (reasoning that because signs with commercial messages were subject to greater restrictions than petitioners' signs, the ordinance did not impermissibly favor commercial over noncommercial speech).

The court of appeals affirmed in part and remanded in part. Pet. App. 85a-115a. It agreed that respondents' specific regulation of temporary directional signs "does not of itself violate the First Amendment." *Id.* at 87a; see *id.* at 102a-111a; see also *id.* at 111a-113a (finding no abuse of discretion in district court's conclusion that ordinance did not impermissibly distinguish between commercial and noncommercial speech). It reasoned that the regulation was not inherently content-based, because its application turned not on "any idea or viewpoint," but instead on "'who' is speaking and 'what event' is occurring." *Id.* at 102a-103a. And it found that the regulation's "restrictions on time, place, and manner * * * would indeed appear to 'actually advance' [respondents'] aesthetic and safety interests by limiting the size, duration, and proliferation of signs." *Id.* at 108a. The court remanded, however, for the district court to address petitioners' claim that "the ordinance unfairly discriminates among forms of noncommercial speech." *Id.* at 87a.

4. The district court subsequently granted summary judgment for respondents. Pet. App. 53a-84a. In addition to reaffirming the conclusions reached in its earlier ruling, *id.* at 62a-70a, it concluded that the ordinance did not unlawfully discriminate between different types of noncommercial speech, *id.* at 70a-74a.

The court of appeals affirmed. Pet. App. 1a-52a. Applying law-of-the-case doctrine, the court adhered to its previous determination that the restrictions on temporary directional signs were, in isolation, content-neutral and constitutional under intermediate scrutiny. *Id.* at 21a-22a. It then reasoned that be-

cause the various types of signs excepted from the permit requirement were "not in competition" with one another, the constitutionality of the ordinance's treatment of temporary directional signs was "not affected" by the ordinance's treatment of ideological and political signs. *Id.* at 33a. The court also reasoned that applying greater restrictions to temporary directional signs than to ideological and political signs was permissible because (1) the First Amendment required an exception to the permit requirement for political and ideological signs, but not temporary directional signs; (2) the time limits on displaying temporary directional signs were legitimately tied to the inherently impermanent purpose of such signs; and (3) the town deserved deference as to the reasonableness of its restrictions, *id.* at 37a-39a.

Judge Watford dissented. Pet. App. 45a-52a. He recognized that governmental regulation of "speech in a public forum" may permissibly "draw distinctions among different categories of non-commercial speech" so long as "those distinctions are justified by some non-communicative aspect of the speech involved." *Id.* at 47a (citing *Carey* v. *Brown*, 447 U.S. 455, 465 (1980); *Police Dep't* v. *Mosley*, 408 U.S. 92, 100 (1972)). He would have held, however, that the distinctions drawn by respondents' ordinance were not sufficiently connected to the town's asserted interests in safety and aesthetics. *Id.* at 51a.

SUMMARY OF ARGUMENT

The court of appeals erred in upholding respondents' sign ordinance, which would be unconstitutional regardless of whether strict or intermediate First Amendment scrutiny applies. To the extent it is necessary to determine the appropriate level of scrutiny,

the Court should hold that intermediate scrutiny applies in the particular context of a sign-regulation scheme premised solely on the government's substantial and content-neutral interests in safety and aesthetics. Those interests have long been understood as valid bases for limiting the proliferation of signs; they can justify not only general limitations on signs, but also exceptions for signs whose content promotes (or does not significantly detract from) safety and aesthetics; and the existence of such exceptions should not in itself trigger strict scrutiny. Even under intermediate scrutiny, however, respondents' ordinance—in contrast to the more carefully calibrated Highway Beautification Act—draws distinctions between different types of signs that are not sufficiently connected to safety and aesthetic rationales.

I. This Court has long viewed laws that "stifle[] speech on account of its message," *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 641 (1994), with more skepticism than laws "justified without reference to the content of the regulated speech," *Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989) (citation omitted). The former are typically labeled "content based" and subject to strict scrutiny, while the latter are typically labeled "content neutral" and subject to less-exacting "intermediate" scrutiny. But because the content-based and content-neutral labels, at bottom, reflect judgments about the degree to which a law risks infringing on the core protections of the First Amendment, laws are not always easy to place in one category or the other, and classification may require close analysis.

In particular, laws that affect different content in different ways, but whose rationales are not inherent-

ly tied to the communicative impact of speech, have sometimes been treated as content-neutral, and evaluated under intermediate scrutiny, in contexts where the connection between the rationales and the regulation is readily apparent and generally innocuous. Facially neutral laws with disproportionate impact on certain content, for example, are typically subject only to intermediate scrutiny. See *Rock Against Racism*, 491 U.S. at 791. Likewise, a law regulating the location of theaters only when they show adult films can properly be considered content-neutral (or at least evaluated under intermediate scrutiny) when the city's rationale for the law is based not on the content of the films, but the secondary effects of the theaters on the surrounding community. See *City of Renton* v. *Playtime Theatres, Inc.*, 475 U.S. 41 (1986). And the Court has acknowledged that a law prohibiting newsracks only when they contain certain types of publications could be considered content-neutral if the distinction were based on neutral rationales. See *City of Cincinnati* v. *Discovery Network, Inc.*, 507 U.S. 410, 428-429 (1992).

Laws that regulate the display of signs are typically premised on the content-neutral rationales of promoting safety and aesthetics. In the specialized context of sign regulation, those substantial government interests can support not only an overall limitation on the visual clutter than signs can create, but also particularized exceptions for signs containing certain content. A municipality could legitimately conclude, for example, that a sign regulation's overall goal of safety would be enhanced by allowing privately displayed signs that warn drivers about potential safety hazards (*e.g.*, "Kids At Play") to have attention-

attracting features (such as bright colors) that are forbidden to other (non-safety-related) signs. The existence of such an exception, which itself has a safety-based rationale, should not change the overall content-neutral character of the scheme or the propriety of intermediate scrutiny.

A sign-regulation scheme that contains safety- and aesthetics-based exceptions typically does not give rise to any substantial concern that the government is attempting to shape public debate or that its interests are pretextual. Subjecting sign regulations to strict scrutiny whenever they draw distinctions defined by reference to a sign's content will have the perverse effect of discouraging sign-regulation provisions that could advance the legislature's goals equally well (or even better) while restricting less speech. Application of intermediate scrutiny, on the other hand, will promote speech by encouraging sensible exceptions to sign restrictions, while still allowing courts to identify exceptions that are not carefully drawn to advance content-neutral interests.

II. Respondents' sign ordinance cannot satisfy intermediate scrutiny. A temporary directional sign does not inherently create any more visual clutter than an ideological or political sign, and no safety or aesthetic rationale adequately supports allowing unlimited ideological or political signs of up to 32 square feet in size, while allowing only a limited number of temporary directional signs of only six square feet apiece. And while respondents have a legitimate safety- and aesthetic-related rationale for requiring that temporary directional signs be taken down following the conclusion of the event to which they relate (and have thus served their purpose), the stringent

time limitations here restrict considerably more speech than that rationale would support.

Although not at issue in this case, the more finely honed provisions of the federal Highway Beautification Act provide a useful contrast to respondents' less coherent restrictions. The federal Act applies to signs only in particular places near certain federally funded highways. And the exceptions for certain signs within those zones, which allow for safety- and aesthetic-promoting signs such as directional and landmark signs, are consistent with the overall neutral purposes of the scheme. The Court accordingly can and should hold respondents' ordinance unconstitutional without calling into question the constitutionality of the Highway Beautification Act.

ARGUMENT

Judicial consideration of whether a particular law violates the First Amendment's Free Speech Clause frequently requires a threshold determination of "the level of scrutiny applicable" to the challenged regulation. *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 637 (1994). Respondents' ordinance would be unconstitutional under either strict or intermediate scrutiny, and thus the Court need not decide which would apply. Should the Court address that question, however, it should hold that intermediate scrutiny is appropriate for a sign regulation when the government's rationales for the regulation are limited to its substantial interests in safety and aesthetics. Safety and aesthetics are long-accepted rationales for sign regulation. A legislature seeking to limit expressive activity no more than necessary to promote those goals might well except signs with certain content—say, signs that warn the public about safety hazards—from

restrictions applicable to other types of signs. So long as the contours of a particular sign regulation are adequately supported by reference the long-accepted rationales of safety and aesthetics, the regulation should be deemed constitutional. Even under that standard, however, respondent's ordinance, unlike the federal Highway Beautification Act, would be unconstitutional.

I. A SIGN REGULATION PREMISED SOLELY ON SAFETY AND AESTHETICS SHOULD BE SUBJECT TO INTERMEDIATE SCRUTINY

The level of scrutiny applicable to a particular law is generally determined by whether the law is labeled "content based" or "content neutral." See, *e.g.*, *Turner Broad. Sys.*, 512 U.S. at 641-643. The Court typically applies "strict scrutiny" to a law labeled content-based, upholding the law when it is "the least restrictive means of achieving a compelling state interest." *McCullen* v. *Coakley*, 134 S. Ct. 2518, 2530 (2014). The Court applies "intermediate scrutiny" to a law labeled content-neutral, upholding the law so long as it "advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests." *Holder* v. *Humanitarian Law Project*, 561 U.S. 1, 26-27 (2010) (citation omitted). Under this Court's pragmatic and context-dependent approach to content-neutrality, a comprehensive sign-regulation scheme, whether or not it contains content-specific exceptions, should be subject only to intermediate scrutiny when its rationales are limited to the substantial governmental interests in safety and aesthetics.

A. This Court Has Taken A Context-Dependent Approach In Determining Whether To Label A Law Content-Neutral And Apply Intermediate Scrutiny

1. The "content based" and "content neutral" labels are usually determinative of the level of scrutiny a law will receive, which, in turn, is often determinative of its constitutionality. Accordingly, the Court has not always applied those labels in a mechanical way. Instead, it has treated them essentially as shorthand for nuanced judgments about the manner in which a particular law implicates the First Amendment and the degree of judicial skepticism it warrants. See, *e.g.*, *City of L.A.* v. *Alameda Books, Inc.*, 535 U.S. 425, 448-449 (2002) (Kennedy, J., concurring in the judgment) (postulating that a prior decision had employed the content-neutral label to describe a situation in which a law, more literally considered content-based, should be subject to "intermediate rather than strict scrutiny" due to its "built-in legitimate rationale"). As a result, "[d]eciding whether a particular regulation is content based or content neutral is not always a simple task." *Turner Broad. Sys.*, 512 U.S. at 642. The Court has refrained from adopting a one-size-fits-all rule that would dictate the standard of review, and it has sometimes labeled laws content-neutral even where they implicitly or explicitly have differential effects on various types of content.

The Court's approach reflects the reality that some types of governmental regulation endanger core First Amendment values more than others. "At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence." *Turner Broad. Sys.*, 512 U.S. at 641. A

law that "stifles speech on account of its message * * * contravenes this essential right" and "'rais[es] the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace.'" *Ibid.* (quoting *Simon & Schuster, Inc.* v. *Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991)). Such a law accordingly receives "the most exacting scrutiny." *Id.* at 642. "In contrast, regulations that are unrelated to the content of speech * * * in most cases pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue." *Ibid.* They thus receive a more deferential form of review. *Ibid.*; see Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. Chi. L. Rev. 413, 443-456 (1996) (*Private Speech*) (explaining that the content-based and content-neutral labels can be seen to reflect different default levels of skepticism about the underlying motives of the enacting legislature).

2. The Court has explained that the "principal inquiry in determining content neutrality is whether the government has adopted a regulation of speech because of agreement or disagreement with the message it conveys." *Turner Broad. Sys.*, 512 U.S. at 642 (brackets omitted) (quoting *Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989)). In most cases, the terms of a law make clear whether it should be labeled content-based or content-neutral. The determination of content-neutrality, is not, strictly speaking, a purely textual inquiry; the Court has repeatedly stressed that "[g]overnment regulation of expressive activity is content neutral so long as it is '*justified* without reference to the content of the regu-

lated speech.'" *Rock Against Racism*, 491 U.S. at 791 (quoting *Clark* v. *Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984)). But "[t]he purpose, or justification, of a regulation will often be evident on its face." *Turner Broad. Sys.*, 512 U.S. at 642.

Accordingly, "[a]s a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of ideas or views expressed are content based." *Turner Broad. Sys.*, 512 U.S. at 643. The rationales for a law that draws facial distinctions based on the content of speech are typically themselves content-focused. See, *e.g.*, *Republican Party* v. *White*, 536 U.S. 765, 768, 775 (2002) (rationales advanced for prohibition on judicial candidates' announcement of views on certain issues included having judges appear impartial); *McIntyre* v. *Ohio Elections Comm'n*, 514 U.S. 334, 336, 348 (1995) (rationales advanced for ban on distributing anonymous campaign literature included "providing the electorate with relevant information"); see, *e.g.*, *Consolidated Edison Co. of N.Y., Inc.* v. *Public Serv. Comm'n*, 447 U.S. 530, 532, 537 (1980) (rationale advanced for ban on utility-bill inserts that discussed certain issues was that "consumers will benefit from receiving 'useful' information, but not from the prohibited information").

By the same token, "laws that confer benefits or impose burdens on speech without reference to the ideas or views expressed are in most instances content neutral." *Turner Broad. Sys.*, 512 U.S. at 643. Where the law on its face regulates evenhandedly, the rationales for the law (even if not sufficient to sustain the law's constitutionality) typically are not premised on favoritism of one type of speech over another. See,

e.g., *Bartnicki* v. *Vopper*, 532 U.S. 514, 517, 529 (2001) (rationales advanced for statute prohibiting knowing disclosure of illegally intercepted communications were "removing an incentive for parties to intercept private conversations" and "minimizing the harm to persons whose conversations have been illegally intercepted"); *Frisby* v. *Schultz*, 487 U.S. 474, 476, 484 (1988) (rationale advanced for ban on picketing "'before or about' any residence" was "protect[ing] residential privacy"); *Heffron* v. *International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 643, 651 (1981) (rationale advanced for rule limiting "'sale or distribution of any merchandise, including printed or written material'" to preassigned booths on fair grounds was "interest in the orderly movement of a large crowd and in avoiding congestion") (brackets omitted).

3. Some situations, however, require a deeper inquiry into whether the challenged law should be labeled content-based or content-neutral. Of particular relevance here, the Court has taken a context-sensitive approach to ascertaining the appropriate level of scrutiny for a law that implicitly or explicitly has varying impacts on different types of content, but has content-neutral rationales.

The Court has made clear that "the mere assertion of a content-neutral purpose" will not in itself preclude the application of strict scrutiny to a law that "on its face, discriminates based on content." *Turner Broad. Sys.*, 512 U.S. at 642-643 (emphasis added). In *Carey* v. *Brown*, 447 U.S. 455 (1980), for example, the Court applied strict scrutiny to a law that banned all non-labor-related picketing in certain areas, notwithstanding an asserted content-neutral rationale of

protecting residential privacy. *Id.* at 464-465. And in *Arkansas Writers' Project, Inc.* v. *Ragland*, 481 U.S. 221 (1987), the Court applied strict scrutiny to a law that taxed magazines on some topics but not others, notwithstanding the law's asserted content-neutral rationales of raising revenue, promoting fledgling publications, and fostering communication. *Id.* at 228-234. In both cases, the Court observed that the asserted rationales for the laws did not meaningfully explain the distinctions the laws drew. *Id.* at 231-232; *Carey*, 447 U.S. at 465.

Those decisions do not, however, demonstrate that laws imposing differential restrictions on particular types of content *invariably* receive strict scrutiny. "Each method of communicating ideas is 'a law unto itself' and that law must reflect the 'differing natures, values, abuses and dangers' of each method." See *Metromedia, Inc.* v. *City of San Diego*, 453 U.S. 490, 501 (1980) (plurality opinion) (quoting *Kovacs* v. *Cooper*, 336 U.S. 77, 97 (1949) (Jackson, J., concurring)). The Court has accordingly recognized that in certain limited contexts, where content-specific regulations have evident and sensible content-neutral rationales, less judicial skepticism is warranted. In particular, the Court has recognized that a law's content-neutral rationale may be the overriding factor in at least three distinct situations.

First, the Court has typically classified a facially neutral law with disproportionate impacts on certain types of content as content-neutral, so long as the law's rationale does not take content into account. In *Ward* v. *Rock Against Racism*, *supra*, for example, the Court explained that "[a] regulation that serves purposes unrelated to the content of expression is

deemed neutral, even if it has an incidental effect on some speakers or messages but not others." 491 U.S. at 791; see *Christian Legal Soc'y Chapter* v. *Martinez*, 130 S. Ct. 2971, 2994 (2010) (same); *City of Erie* v. *Pap's A.M.*, 529 U.S. 277, 294-295 (2000) (plurality opinion) (similar); see also *McCullen*, 134 S. Ct. at 2531 ("[A] facially neutral law does not become content based simply because it may disproportionately affect speech on certain topics.").

Second, the Court has classified a law as content-neutral, even when it draws *express* distinctions between different types of content, so long as the law's rationale is focused on the "secondary effects" of the speech. In *City of Renton* v. *Playtime Theatres, Inc.*, 475 U.S. 41 (1986), for example, the Court applied intermediate scrutiny to a municipal ordinance prohibiting "adult motion picture theaters from locating within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, park, or school." *Id.* at 43; see *id.* at 50; see also *Alameda Books*, 535 U.S. at 433-442 (plurality opinion) (applying *Playtime Theatres* to another regulation on the location of adult businesses). Although the ordinance "treat[ed] theaters that specialize in adult films differently from other kinds of theaters," the Court attached controlling weight to the fact that the ordinance was "*aimed* not at the content of the films shown at 'adult motion picture theatres,' but rather at the secondary effects of such theaters on the surrounding community." *Playtime Theatres*, 475 U.S. at 47 (emphasis added; emphases omitted).

Observing that the ordinance furthered the city's "zoning interests" in "prevent[ing] crime, protect[ing] the city's retail trade, maintain[ing] property values,

and generally protect[ing] and preserv[ing] the quality of the city's neighborhood, commercial districts and the quality of urban life," the Court found it to be "completely consistent with [the] definition of 'content-neutral' speech regulations as those that 'are *justified* without reference to the content of the regulated speech.'" *Playtime Theatres*, 475 U.S. at 48 (quoting *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976)). The Court emphasized that the ordinance did "not contravene the fundamental principle that underlies [the] concern about 'content-based' speech regulations: that 'government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views.'" *Id.* at 48-49 (quoting *Police Dep't* v. *Mosley*, 408 U.S. 92, 95-96 (1972)); see *Alameda Books*, 535 U.S. at 448-449 (Kennedy, J., concurring in the judgment) (suggesting that *Playtime Theatres* is an example of a content-based restriction that should nevertheless be subject only to intermediate scrutiny).

Third, the Court has recognized that, even outside the context of the "secondary effects" doctrine at issue in *Playtime Theatres*, a law drawing express distinctions between different types of content may be treated as content-neutral, when the distinctions are adequately supported by content-neutral rationales such as safety and aesthetics. In *City of Cincinnati* v. *Discovery Network, Inc.*, 507 U.S. 410 (1992), a city had banned "newsracks dispensing 'commercial handbills,'" but allowed newsracks dispensing other types of publications. *Id.* at 418. The city argued that the ban should be viewed as content-neutral because it

served legitimate interests in "safety and esthetics" that were "entirely unrelated to the content of respondents' publications." *Id.* at 428-429. Although the Court rejected that argument on the ground that the city had "no justification for [its] particular regulation other than [its] naked assertion that commercial speech has 'low value,'" *id.* at 429, it accepted the general principle that content-neutral rationales might warrant labeling even a law that distinguishes between different publications as content-neutral. *Id.* at 429-430; see *id.* at 430 (separately discussing the "secondary effects" doctrine of *Playtime Theatres*). In particular, the Court made clear that if the city had indeed advanced "a neutral justification for its selective ban on newsracks," it could have "defend[ed] its newsrack policy as content neutral." *Id.* at 429-430; see *id.* at 424 (noting that the distinction between commercial and noncommercial publications "bears no relationship *whatsoever* to" safety and aesthetics).

B. Intermediate Scrutiny Is Appropriate When The Rationales Advanced For A Sign-Regulation Scheme Are Limited To Safety And Aesthetics

The foregoing considerations make intermediate scrutiny appropriate in the particular context of certain sign regulations. The substantial and content-neutral interests in safety and aesthetics that typically underlie regulation of signs can also lead legislatures to craft exceptions to a generalized sign regulation for signs that either enhance or do not unduly infringe upon those interests. Accordingly, where the rationales advanced for a sign-regulation scheme, including any exceptions it may contain, are limited to safety and aesthetics, the scheme should be subject to intermediate scrutiny.

1. As this Court has recognized, the government's substantial interests in enhancing safety and aesthetics can support at least some restrictions on signs. In *Metromedia, Inc.* v. *City of San Diego, supra*, for example, "[t]he Court concluded that [a] city's interest in traffic safety and its esthetic interest in preventing 'visual clutter' could justify a prohibition of off-site commercial billboards even though similar on-site signs were allowed." *City of Ladue* v. *Gilleo*, 512 U.S. 43, 49 (1994); see *Metromedia*, 453 U.S. at 509 (plurality opinion) ("We * * * hesitate to disagree with the accumulated, common-sense judgment of local lawmakers and of the many reviewing courts that billboards are real and substantial hazards to traffic safety."). Similarly, in *Members of the City Council* v. *Taxpayers for Vincent*, 466 U.S. 789 (1983), the Court "reaffirmed" that the "interest in avoiding visual clutter" recognized in *Metromedia* was substantial, *id.* at 805-808, and found that interest sufficient to support a city's prohibition on posting signs on public property. *Id.* at 805-808, 817; see *id.* at 807 (recognizing that a "visual assault * * * presented by an accumulation of signs" can be "a significant substantive evil"); see also *Gilleo*, 512 U.S. at 50. And in *City of Ladue* v. *Gilleo, supra*, the Court unanimously recognized that "signs take up space and may obstruct views, distract motorists, displace alternative uses for land, and pose other problems that legitimately call for regulation." 512 U.S. at 48.

A legislature undertaking sign regulation for the enhancement of safety and aesthetics may have strong reasons for differentiating between signs containing certain types of content. In the absence of such distinctions, the regulation would not only be "subject to

attack on the ground that [it] simply prohibit[s] too much protected speech," *Gilleo*, 512 U.S. at 51, but could affirmatively *disserve* the interests that the legislature is legitimately seeking to advance. In the context of the Highway Beautification Act, for example, a prohibition so sweeping as to ban even roadside directional signs would *reduce* traffic safety by eliminating a vital navigation aid for drivers. Similarly, a prohibition against brightly colored signs (likely to be particularly distracting and aesthetically displeasing) might legitimately contain an exception for signs providing important safety-related information (which will be more effective if they attract attention), such as a sign at a private school warning motorists of the presence of children. Or a regulation prohibiting signs that obstruct scenic views might contain an exception for signs that enhance appreciation of the landscape, such as signs that call visitors' attention to particularly impressive natural features or that mark historically significant sites.

2. The Court has previously acknowledged, but has not resolved, the analytical difficulty presented by sign regulations that draw such distinctions. The billboard ordinance at issue in *Metromedia*, in addition to (permissibly) distinguishing between certain types of commercial speech, also distinguished between certain types of noncommercial speech, including by excepting certain types of signs from the ordinance's more general restrictions. 453 U.S. at 494-495 & n.3 (plurality opinion). Not all of those exceptions could have been supported by reference to safety and aesthetics, see *ibid.*, and the plurality opinion was skeptical of them, see, *e.g.*, *id.* at 512-517. A majority of the Court, however, would have allowed at least some types of

exceptions to a general scheme of sign regulation. See *id.* at 532 n.10 (Brennan, J., concurring in the judgment) (suggesting that such exceptions, no matter what their rationale, should be evaluated under a form of intermediate scrutiny, "with special care" given to "content-based exceptions"); *id.* at 554 (Stevens, J., dissenting in part) (reasoning that the "neutral exceptions in the * * * ordinance do not present [the] danger" of the government "shaping the agenda for public debate"); *id.* at 566 (Burger, C.J., dissenting) (reasoning that the city's "recognition of the need for certain exceptions permitting limited forms of communication, purely factual in nature and neutral as to the speaker" did not undermine its neutral objectives); *id.* at 570 (Rehnquist, J., dissenting) (reasoning that the ordinance's "limited exceptions" were not "the types which render this statute unconstitutional").

In *Gilleo*, the Court again addressed a municipal sign ordinance that excepted certain types of signs, including signs identifying safety hazards, from an otherwise-broad prohibition. 512 U.S. at 46-47 & n.6. The Court found the statute unconstitutional not because of the exceptions, but because *notwithstanding* the exceptions, the city's "near-total prohibition of residential signs" effectively "closed off" an "important medium" and thus prohibited too much speech. *Id.* at 53, 56; see *id.* at 51-59. Recognizing that sign ordinances present difficult analytical problems, because they are subject to attack as both over-inclusive (if they do not contain exceptions) and under-inclusive (if they do), the Court was willing to assume that "the various exemptions [were] free of impermissible content or viewpoint discrimination." *Id.* at

53; see *id.* at 51; see also *Taxpayers for Vincent*, 466 U.S. at 815-816 (discussing over- and underinclusivity problems in sign regulation). And it declined to dismiss out of hand the city's argument that the "mix of prohibitions and exemptions in the ordinance * * * reflect[ed] legitimate differences among the side effects of various kinds of signs, * * * only adventitiously connected with content" and that such differences "suppli[ed] a sufficient justification, unrelated to the City's approval or disapproval of specific messages, for carving out specified categories from the general ban." *Gilleo*, 512 U.S. at 52.

3. Should the Court reach the level-of-scrutiny question in this case, it should hold that a comprehensive sign regulation of the kind here is subject to intermediate scrutiny so long as the government's rationales for the regulation are limited to its substantial interests in safety and aesthetics. Even where a sign regulation contains exceptions for signs with certain content, the regulation remains "*justified* without reference to the content of the regulated speech," *Rock Against Racism*, 491 U.S. at 791 (citation omitted), when the rationales for the exceptions are based on safety or aesthetics. Exceptions that are crafted for safety and aesthetic purposes do not reflect a generalized favoritism for speech on certain topics, but instead ensure that the sign regulation does not sweep so broadly as to preclude expressive activity that advances (or, at least, does not undermine) the scheme's overall goals. Particularly in light of this Court's suggestion that the First Amendment might affirmatively *require* exceptions to a general sign ordinance for signs whose regulation does not promote the government's "traffic control and safety

interests" or "interests in esthetics," *Taxpayers for Vincent*, 466 U.S. at 816, it makes little sense to subject a sign ordinance to strict scrutiny simply because a legislature has itself paid close attention to the scope of regulation necessary to advance those interests.

A sign-regulation scheme with exceptions that rest solely on safety and aesthetic rationales does not intrude upon core First Amendment's values in the same way or to the same degree as the sort of content-based regulation traditionally subject to strict scrutiny. Cf. *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 388 (1992) ("When the basis for content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint discrimination exists."). Exceptions with safety and aesthetic rationales are unlikely to "represent a governmental 'attempt to give one side of a debatable public question an advantage in expressing its views to the people.'" *Gilleo*, 512 U.S. at 51 (quoting *First Nat'l Bank* v. *Bellotti*, 435 U.S. 765, 785 (1978)). Similarly, "the combined operation of a general speech restriction and its exemptions" is unlikely to reflect a governmental effort to "select the 'permissible subjects for public debate' and thereby to 'control the search for political truth,'" *ibid.* (quoting *Consolidated Edison*, 447 U.S. at 538), when any exceptions defined by reference to content must be supported by the content-neutral interests that underlie the scheme as a whole. And precisely because the exceptions are tied to the rationales for the scheme itself, they do not "diminish the credibility of the government's rationale for restricting speech in the first place." *Id.* at 52 (citing *Discovery Network*, 507 U.S. at 424-426).

Reviewing exceptions to a comprehensive sign regulation under strict scrutiny would undermine First Amendment interests by incentivizing legislatures to prohibit *more* speech, rather than less. As the Court has recognized, limitations on the scope of a sign regulation can "preserve[]" a "significant opportunity to communicate." *Taxpayers for Vincent*, 466 U.S. at 811. But if any customized exceptions defined by reference to content must be defended under strict scrutiny, then even an exception that enhances safety or aesthetics would render the ordinance vulnerable to invalidation. A legislature thus might well forgo such an exception, rather than risk a lawsuit by those seeking additional exceptions that might be inconsistent with safety and aesthetic goals. See *Gilleo*, 512 U.S. at 53 (noting that under a "content discrimination rationale," a city "might theoretically remove the defects in its ordinance by simply repealing all of the exemptions"). Under a rule effectively mandating that *every* type of sign be granted the same exception as *any* type of sign, exceptions will be rarer and more limited in scope. And sign-regulation schemes overall will be less precisely calibrated to restrict only as much expressive activity as necessary to promote the government's substantial content-neutral interests.

Reviewing such exceptions under intermediate scrutiny, on the other hand, would not invite legislative abuse. Because strict scrutiny would still apply when the government advances rationales *other* than safety and aesthetics to defend a regulatory distinction between noncommercial signs with different types of content, legislatures would not be able to make generalized value judgments about the relative utility of certain types of speech. See, *e.g.*, *Discovery*

Network, 507 U.S. at 428 (rejecting distinction based on "low value" of certain speech); see also *Linmark Assocs., Inc.* v. *Willingboro Twp.*, 431 U.S. 85, 86, 93-94, 98 (1977) (invalidating content-based sign restriction enacted "to stem what [the township] perceives as the flight of white homeowners from a racially integrated community"). And intermediate scrutiny is itself sufficiently robust to flush out cases in which asserted safety and aesthetic rationales for a particular exception are pretextual or insubstantial. See, *e.g.*, *McCullen*, 134 S. Ct. at 2534-2535 (observing that intermediate scrutiny "prevents the government from too readily 'sacrificing speech for efficiency'") (brackets omitted) (quoting *Riley* v. *National Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988)); *Private Speech*, 63 U. Chi. L. Rev. at 454 (noting that "flunking" intermediate scrutiny "demonstrates that a content-neutral law has an illegitimate basis").

Critically, in order to survive intermediate scrutiny, a government must show not only that an exception to a sign regulation is *in itself* "narrowly tailored to serve" safety and aesthetic interests, *McCullen*, 134 S. Ct. at 2534 (quoting *Rock Against Racism*, 491 U.S. at 796), but also that any *differential treatment* of various categories of signs is adequately supported. That requirement, which the court of appeals here did not apply, see Pet. App. 33a-41a, imposes significant constraints on legislatures and will lead courts to invalidate sign ordinances that lack appropriate precision.

II. RESPONDENTS' SIGN ORDINANCE FAILS INTERMEDIATE SCRUTINY, BUT THE HIGHWAY BEAUTIFICATION ACT WOULD NOT

Assuming that respondents' rationale for their sign ordinance is based solely on safety and aesthetics, and that the ordinance would thus be subject to intermediate scrutiny, the distinctions drawn by the ordinance would nevertheless be unconstitutional. See Pet. i (question presented encompassing both appropriate level of scrutiny and whether respondents' "differential treatment" of signs is "justif[ied]"). But a more limited and carefully crafted regulation, such as the Highway Beautification Act, would be consistent with the First Amendment.

A. Respondents' Differential Treatment Of Temporary Directional Signs Does Not Meaningfully Advance Interests In Safety And Aesthetics

1. To survive intermediate scrutiny, a regulation must exhibit a sufficiently "close fit between ends and means." *McCullen*, 134 S. Ct. at 2534. In this case, respondents have failed to adequately explain how the goals of improving safety and aesthetics are appropriately advanced by treating ideological and political signs much more favorably than temporary directional signs. Temporary directional signs "are no greater an eyesore," *Discovery Network*, 507 U.S. at 425, than ideological or political signs. And temporary directional signs, which will help some drivers find their destination, may actually improve traffic safety (or at least have safety benefits that offset the visual clutter they create) in ways that nondirectional ideological or political signs do not. Yet ideological and political signs may be three to five times larger than temporary directional signs, and they are not restricted in

number, as temporary directional signs are. Pet. App. 147a-148a (GLDC §§ 4.402(I), 4.402(J), (P)(1)-(2)).

Respondents' ordinance also imposes stringent time restrictions on temporary directional signs (which may only be displayed 12 hours before and one hour after an event) that it does not impose on ideological signs (which may be displayed indefinitely) or political signs (which may be displayed for extended periods). See Pet. App. 147a-149a (GLDC §§ 4.402(I), 4.402(J), (P)(3)). Safety and aesthetic rationales might in theory support somewhat stricter time limits on the display of temporary direction signs as opposed to other signs. Temporary directional signs relate to specific time-limited events; the expressive value of signs directing people to events that have already concluded (or will take place only far in the future) is limited; and respondents have an interest in eliminating the visual clutter caused by signs that are no longer (or are not yet) relevant. Indeed, out-of-date directional signs may be affirmatively unsafe, confusing motorists into driving around in search of events that are not actually occurring. Ideological and political signs present no such misdirection concerns and are considerably more likely to retain substantial expressive value as an indicator of ideological or political views even if they relate to an event (*e.g.*, the Vietnam War or the 2012 presidential election) that has long since passed.

But the strict time restrictions that respondents' ordinance imposes on temporary directional signs "burden substantially more speech than is necessary to further [respondents'] legitimate interests." *Rock Against Racism*, 491 U.S. at 799. The restrictions cover signs that clearly state the time and date of the

relevant events (and are thus substantially less likely to confuse drivers) as well as those that do not; they apply equally to recurring (and thus continuously relevant) events, such as daily prayer meetings, in the same way that they apply to one-time events; and they limit publicity for morning events like petitioners' largely to nighttime hours, during which the signs may be nearly impossible to see, see Pet. App. 49a (Watford, J., dissenting). Although a legislature deserves leeway as to the precise manner in which it addresses visual clutter from irrelevant signs, see *Rock Against Racism*, 491 U.S. at 800, the particular regulation here goes further than is reasonable to advance that legitimate objective.

2. The court of appeals suggested (Pet. App. 37a-38a) that ideological and political signs could be singled out for especially favorable treatment because imposing too many restrictions on such signs might itself create constitutional problems. See *Gilleo*, 512 U.S. at 54-59 (invalidating sign ordinance that "almost completely foreclosed" all signs and "totally foreclosed" signs containing "political, religious, or personal messages"). But this Court's decisions prohibit respondents from abstractly weighing the value, constitutional or otherwise, of different kinds of noncommercial speech and deciding that political and ideological signs are important enough to warrant the creation of visual clutter while temporary directional signs (like petitioners' religion-related signs) are not. See, *e.g.*, *Brown*, 447 U.S. at 460-471 (concluding that exemption from antipicketing law for labor-related picketing violated Equal Protection Clause); *Mosley*, 408 U.S. at 97-102 (same); see also *Taxpayers for Vincent*, 466 U.S. at 816 (suggesting that more favorable

treatment for signs on political topics might be unconstitutional). Such a value-driven approach, which would differentiate between types of signs that are "equally responsible" for "safety concerns and visual blight," *Discovery Network*, 507 U.S. at 426-427, would be explicitly content-based and would lack any sort of compelling justification sufficient to survive strict scrutiny.

If requiring a permit for ideological or political signs would in fact create a constitutional problem, see *Gilleo*, 512 U.S. at 58 n.17 (noting open question of constitutionality of sign regulations "short of a ban"), then respondents must address that problem in a more generalized way. Respondents could, for example, allow residents to display a small number of signs of any type, while requiring a permit for additional signs. Or they could generally allow only smaller signs but require a permit for larger ones. But they cannot create specialized exceptions that single out ideological and political signs for favorable treatment.

B. The Highway Beautification Act Is An Example Of A Constitutional Scheme Of Sign Regulation

In contrast to respondents' ordinance, the federal Highway Beautification Act is appropriately tailored to advance the government's substantial interests in safety and aesthetics without burdening substantially more speech than necessary. While this case does not call for the Court to express a view on the meaning or validity of that Act—see, *e.g.*, *Metromedia*, 453 U.S. at 515 n.20 (plurality opinion) (declining to address the Highway Beautification Act); *id.* at 534 n.11 (Brennan, J., concurring in the judgment) (same)—the Act's measured approach may be useful for purposes of comparison with respondents' less calibrated scheme.

As a threshold matter, the federal Act is more limited in scope than respondents' ordinance. While respondents' ordinance applies throughout the town, the relevant provisions of the Highway Beautification Act apply only within certain distances of particular federally funded highways. 23 U.S.C. 131(c)-(d). The Act is thus much more analogous to the sorts of zoning laws that this Court has analyzed under intermediate scrutiny. See *Playtime Theatres*, 475 U.S. at 48. In particular, the Act does not raise a concern, as respondents' ordinance might, of effectively "foreclos[ing] a venerable means of communication" for an entire community, *Gilleo*, 512 U.S. at 54.

Although the Highway Beautification Act contains certain narrow exceptions to the restrictions it encourages States to impose in particular areas, see 23 U.S.C. 131(c), those exceptions are closely tied to the safety and aesthetic rationales for the Act as a whole, see 23 U.S.C. 131(a). The exception for "directional and official" signs, including signs "pertaining to natural wonders" and "scenic and historic attractions," 23 U.S.C. 131(c)(1), enhances safety by ensuring that drivers receive important information that will aid in travel and navigation, and it enhances aesthetics by ensuring that drivers are informed of important features of the locale. See also 23 U.S.C. 131(f) and (*o*) (allowing certain other informational signs). The exceptions for for-sale and for-lease signs, as well as for signs (both commercial and noncommercial) relating to activities occurring on the property where the sign is displayed, 23 U.S.C. 131(c)(2)-(3), enhance safety by helping drivers locate relevant businesses and activities, and they have only a marginal impact on aesthetics, because they are integrated with the

use to which the land is already being put. See *Discovery Network*, 507 U.S. at 425 n.20 (discussing *Metromedia* and noting that signs about onsite activities can "guid[e] potential visitors to their intended destinations" and that signs about offsite activities may be more problematic because their content may change more frequently). The exception for landmark, historic, and artistic signs, 23 U.S.C. 131(c)(4), increases appreciation of an area's historical and aesthetic properties. And the exception for free coffee, 23 U.S.C. 131(c)(5), enhances safety by informing tired drivers about the availability of a pick-me-up.

All of these exceptions have the salutary effect of allowing more, rather than less, speech. None of them reflects the sort of value-laden judgments inherent in respondents' distinctions between, *inter alia*, ideologicial and political signs and other kinds of signs. And none of them "rais[es] the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace," *Turner Broad. Sys.*, 512 U.S. at 641 (citation omitted). The Court should therefore hold that respondents' ordinance violates the First Amendment without suggesting that the Highway Beautification Act contains similar constitutional infirmities.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

KATHRYN B. THOMSON
General Counsel
PAUL M. GEIER
Assistant General Counsel for Litigation
PETER J. PLOCKI
Deputy Assistant General Counsel for Litigation
CHRISTOPHER S. PERRY
Senior Trial Attorney
Department of Transportation

ROBERT J. BLACK
Senior Attorney
Federal Highway Administration

SEPTEMBER 2014

DONALD B. VERRILLI, JR.
Solicitor General
JOYCE R. BRANDA
Acting Assistant Attorney General
IAN HEATH GERSHENGORN
Deputy Solicitor General
ERIC J. FEIGIN
Assistant to the Solicitor General
MICHAEL S. RAAB
LINDSEY POWELL
Attorneys

AMICUS CURIAE BRIEF

RECORD AND BRIEFS

Supreme Court, U.S.
FILED
SEP 22 2014
OFFICE OF THE CLERK

No. 13-502

In the Supreme Court of the United States

PASTOR CLYDE REED AND GOOD NEWS COMMUNITY CHURCH,

Petitioners,

v.

TOWN OF GILBERT, ARIZONA, AND ADAM ADAMS, IN HIS OFFICIAL CAPACITY AS CODE COMPLIANCE MANAGER,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* THE AMERICAN CENTER FOR LAW AND JUSTICE IN SUPPORT OF PETITIONERS

Mark Goldfeder
CENTER FOR THE STUDY OF LAW AND RELIGION
EMORY UNIVERSITY SCHOOL OF LAW
Gambrell Hall, Suite 310
1301 Clifton Rd. NE
Atlanta, GA 30322
(404) 712-0213

Jay Alan Sekulow
Counsel of Record
Stuart J. Roth
Jordan A. Sekulow
Colby M. May
Walter M. Weber
Geoffrey R. Surtees
AMERICAN CENTER FOR LAW & JUSTICE
201 Maryland Ave., N.E.
Washington, D.C. 20002
(202) 546-8890
sekulow@aclj.org

Counsel for Amicus Curiae

Becker Gallagher Cincinnati, OH Washington, D.C. 800.890.5001

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTERESTS OF THE *AMICUS CURIAE* 1

SUMMARY OF THE ARGUMENT 1

ARGUMENT 3

I. Good News Community Church's Signs Are Religious Speech Warranting Full First Amendment Protection 3

II. The Town of Gilbert's Sign Code Is Facially Content-Based Because it Treats Signs Differently Based on Their Content 7

III. The Town of Gilbert's Sign Code Is Content-Based Under This Court's Most Recent Decision Involving a Regulation of Speech: *McCullen v. Coakley* 11

IV. This Court Should Disavow or Clarify the "Principal Inquiry" Test of *Hill* and *Ward* 13

CONCLUSION 19

TABLE OF AUTHORITIES

CASES

Asgeirsson v. Abbott,
696 F.3d 454 (5th Cir. 2012) 15

Bartnicki v. Vopper,
532 U.S. 514 (2001) 19

Boos v. Barry,
485 U.S. 312 (1988) 11, 12, 16

Brown v. Town of Cary,
706 F.3d 294 (4th Cir. 2013) 14

Capital Area Right to Life, Inc. v. Downtown Frankfort, Inc.,
511 U.S. 1135 (1994) 16

Capitol Square Review & Advisory Bd. v. Pinette,
515 U.S. 753 (1995) 4

Carey v. Brown,
447 U.S. 455 (1980) 11, 12

Church of Lukumi Babalu Aye, Inc. v. City of Hialeah,
508 U.S. 520 (1993) 18

Cincinnati v. Discovery Network,
507 U.S. 410 (1993) 17

City of Ladue v. Gilleo,
512 U.S. 43 (1994) 4

City of Los Angeles v. Alameda Books, Inc.,
535 U.S. 425 (2002) 19

Cox v. New Hampshire,
312 U.S. 569 (1941) 10

FCC v. League of Women Voters of Cal.,
468 U.S. 364 (1984) 11

FCC v. Fox TV Stations,
132 S. Ct. 2307 (2012) 13

Good News Club v. Milford Cent. Sch.,
533 U.S. 98 (2001) 3

Hill v. Colorado,
530 U.S. 703 (2000) *passim*

Holder v. Humanitarian Law Project,
561 U.S. 1 (2010) 11

International Union v. Johnson Controls, Inc.,
499 U.S. 187 (1991) 18

Lamb's Chapel v. Center Moriches Union Free Sch. Dist.,
508 U.S. 384 (1993) 4

McConnell v. Fed. Election Comm'n,
540 U.S. 93 (2003) 1

McCullen v. Coakley,
134 S. Ct. 2518 (2013) 2, 11, 12, 13, 18, 19

McIntyre v. Ohio Elections Comm'n,
514 U.S. 334 (1995) 16

Members of City Council v. Taxpayers for Vincent,
466 U.S. 789 (1984) 5

Metromedia, Inc. v. San Diego,
453 U.S. 490 (1981) 4, 10, 11

Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue,
460 U.S. 575 (1983) 17

Palmer v. Waxahachie Indep. Sch. Dist.,
579 F.3d 502 (5th Cir. 2009) 15

Pleasant Grove City v. Summum,
555 U.S. 460 (2009) 1, 15

Police Dept. of Chicago v. Mosley,
408 U.S. 92 (1972) 12

Reed v. Town of Gilbert,
707 F.3d 1057 (9th Cir. 2013) 7, 14

Rosenberger v. Rector & Visitors of Univ. of Va.,
515 U.S. 819 (1995) 15

Schenck v. Pro-Choice Network of Western New York,
519 U.S. 357 (1997) 1

Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.,
502 U.S. 105 (1991) 17

Sorrell v. IMS Health, Inc.,
131 S. Ct. 2653 (2011) 10

Thayer v. City of Worcester,
755 F.3d 60 (1st Cir. 2014) 14

Turner Broadcasting System v. FCC,
512 U.S. 622 (1994) 17

Wag More Dogs, LLC v. Cozart,
680 F.3d 359 (4th Cir. 2012) 14

Wagner v. City of Garfield Heights,
No. 13-3474, 2014 U.S. App. LEXIS 15984
(6th Cir. Aug. 19, 2014) 15

Ward v. Rock Against Racism,
491 U.S. 781 (1989) 13, 14, 16, 17, 18, 19

Widmar v. Vincent,
454 U.S. 263 (1981) 3

CONSTITUTION AND STATUTE

U.S. Const. amend. I *passim*

Gilbert Land Development Code, Division 4,
General Regulations, Article 4.4 *passim*

OTHER AUTHORITIES

Matt Coker, "Atheists, Skeptics and Freethinkers
Protest Calvary Chapel Creation Conference
Today!," OC WEEKLY BLOG (July 24, 2014) 10

Laurie Goodstein, "More Atheists Shout it from the
Rooftops," NEW YORK TIMES (Apr. 26, 2009) 10

Matthew, 28:19-20 (ESV) 5

Michael W. McConnell, *Colloquium, Professor
Michael W. McConnell's Response*, 28 PEPP. L.
REV. 747 (2001) 16

1 Rodney A. Smolla, SMOLLA AND NIMMER ON
FREEDOM OF SPEECH (1998) 16

INTERESTS OF THE *AMICUS CURIAE*[1]

The American Center for Law and Justice ("ACLJ") is an organization dedicated to the defense of constitutional liberties secured by law.

The ACLJ often appears before this Court in support of First Amendment free speech claims. *E.g.*, *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357 (1997); *Hill v. Colorado*, 530 U.S. 703 (2000); *McConnell v. Fed. Election Comm'n*, 540 U.S. 93 (2003). It has also appeared before this Court resisting specious free speech claims. *E.g.*, *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009).

This case is important to the future protection of religious speech and other classic First Amendment activities and is therefore of special interest to the ACLJ.

SUMMARY OF THE ARGUMENT

It is well-established that religious speech is fully protected speech by the First Amendment, entitled to as much security and solicitude as political or ideological speech. The multi-purpose signs of Good News Community Church at issue here, which contain and further religious purposes, fall well within the

---

[1] No counsel for a party authored this brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than *amicus curiae*, its members, or its counsel made a monetary contribution intended to fund its preparation or submission. The parties have consented to the filing of this brief. Petitioners' consent to the filing of all briefs is on file with the Clerk and Respondents' written consent accompanies this brief.

sanctuary afforded by the Free Speech Clause. While the Town of Gilbert—as is the case with any state or local government—is permitted to regulate certain characteristics and properties of signage within its community, neither the Constitution nor this Court's precedents permit it to discriminate against signs, such as those posted by Good News, based on their message. Gilbert's Sign Code does just that. It requires that signs containing different messages be treated differently. What is especially infirm about the Sign Code challenged here is that it treats various types of *noncommercial* speech—such as political and ideological expression, and the religious signs of Good News—with different degrees of favorability in terms of size, density, and duration.

Under First Amendment principles reaffirmed most recently by this Court in *McCullen v. Coakley*, 134 S. Ct. 2518 (2013), this Gilbert cannot do. *McCullen* makes clear that, in deciding whether a speech regulation is content-based or content-neutral, a reviewing court must begin with the text of the regulation itself: does it facially discriminate based on content? That is, must enforcement officials examine the content of speech to determine whether that speech complies with the regulation? Simply put, does application of the regulation depend on what one says? In the case of Gilbert's Sign Code, the answer is *yes*. The Code is content-based and must therefore satisfy the rigor of strict scrutiny.

Relying principally on this Court's opinion in *Hill v. Colorado*, however, the lower court held that because Gilbert did not adopt the Sign Code out of disagreement with any particular message, it is

content-neutral even though the Code requires town officials to inspect the content of signs to decide which restrictions apply. The underlying problem with the Ninth Circuit's analysis lies not so much with its application of *Hill*, but with *Hill* itself. While governmental disagreement with a message can render a restriction content-based, such disagreement is not a prerequisite for finding content discrimination, particularly where the text of the restriction is facially content-based. *Hill* has unfortunately led lower courts astray, leading some, like the court below here, to conclude that a facially content-based speech code can nevertheless be content-neutral, absent *additional* proof of a discriminatory governmental motive.

This Court should either formally eschew *Hill*'s "principal inquiry" test in this and future cases, or, at the very least, reconfigure it in light of more firmly established free speech precedents. It should clarify that a regulation of speech is content-based when it is *either* content-discriminatory on its face *or* content-discriminatory in its purpose.

ARGUMENT

I. Good News Community Church's Signs Are Religious Speech Warranting Full First Amendment Protection.

The law is well-settled that religious speech, *i.e.*, speech with religious content or a religious point of view, is protected under the First Amendment. *See, e.g., Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 110 (2001); *Widmar v. Vincent*, 454 U.S. 263, 269 (1981). As this Court has observed: "[o]ur precedent establishes that private religious speech, far from being

a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression." *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995) (citations omitted). Indeed, the First Amendment protects "religious proselytizing" and "acts of worship." *Id.* at 760-61. The First Amendment "forbids" any local government from "regulat[ing] speech in ways that favor some viewpoints or ideas at the expense of others." *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993).

Petitioner, Good News Community Church ("Good News"), is a small religious community located in Gilbert, Arizona. The congregation of Good News does not have a permanent location, and relies on strategically-placed signs to spread the Gospel of Jesus Christ and invite people to worship. For Good News, inviting others to worship is as much an expression of religious duty as studying the Bible and praying. *See* Pet. Br. 7-8.

While signs might "pose distinctive problems that are subject to municipalities' police powers," they "are a form of expression protected by the Free Speech Clause." *City of Ladue v. Gilleo*, 512 U.S. 43, 48 (1994). Indeed, outdoor signs are "a well-established medium of communication, used to convey a broad range of different kinds of messages." *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 501 (1981) (plurality opinion); *see also id.* ("The outdoor sign or symbol is a venerable medium for expressing political, social and commercial ideas. From the poster or 'broadside' to the billboard, outdoor signs have played a prominent role throughout

American history, rallying support for political and social causes.") (citation omitted).

As Justice Brennan explained, in an observation highly relevant to the case at bar:

> In deciding this First Amendment question, the critical importance of the posting of signs as a means of communication must not be overlooked. Use of this medium of communication is particularly valuable in part because it entails a relatively small expense in reaching a wide audience, allows flexibility in accommodating various formats, typographies, and graphics, and conveys its message in a manner that is easily read and understood by its reader or viewer.

Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 819 (1984) (Brennan, J., dissenting).

There can be no serious dispute that Good News's signs constitute protected speech under the First Amendment. Pursuant to its religious beliefs, the church not only holds worship services, it seeks to invite members of the public to join the church in those services. Publicly sharing a religious message with others by inviting them to visit, attend, or join a religious body is intrinsic to how many religious groups practice their faith. For a small church like Good News, committed to the "Great Commission" of the Gospel,[2] a

---

[2] "Go therefore and make disciples of all nations, baptizing them in the name of the Father and of the Son and of the Holy Spirit, teaching them to observe all that I have commanded you." *Matthew*, 28:19-20 (ESV).

critical way of carrying out this religious-based mission is through the posting of signs that—like political or ideological signs—can communicate the church's message and invitation to a wide audience.

The signs display the church's seal—a sunrise and the Cross rising out of an open book—symbolizing various components of the church's core beliefs.[3] The signs also direct viewers to Good News's website, "www.goodnewspres.com," in addition to providing the location and time of church services. The signs declare to the people of Gilbert that Good News Community Church is "Your Community Church."

The website referred to on Good News's signs provides more information about the church and its beliefs. The site explains that Good News has "Joyful, God-centered worship," and "Reformed, Bible-based expository preaching." Good News is a "welcoming congregation," which is "Christian First, Presbyterian Second." The church's stated goals on the site are: "introducing people to Jesus Christ and preparing them for eternity, being a place of prayer, getting people excited about studying and obeying God's Word, [and] building Christ-centered families."[4]

---

[3] A photograph of the church's sign is reproduced in the Parties' Joint Appendix ("J.A.") at p. 165.

[4] Additionally, the website provides the Apostles Creed, a link to the Westminster Confession of Faith, links and citations to 76 passages of the Bible, and other religiously-oriented statements.

In short, it is beyond dispute that Good News's signs, and the website they highlight, constitute religious speech that must be afforded full protection under the First Amendment.

While the court below noted that Good News "concedes" that its "signs are Temporary Directional Signs," *Reed v. Town of Gilbert*, 707 F.3d 1057, 1061 (9th Cir. 2013), this "concession" does not impede the church's constitutional challenge to the city's Sign Code. The church has never conceded that its signs are *only* directional in nature, and it has never conceded that the Sign Code is content-neutral. To the contrary, the church's signs are *multi-purpose* (religious, ideological, and directional) and, as explained below, the Sign Code is content-based in treating the church's multi-purpose signs differently than ideological or political signs—to use two critical examples. This case is not about how properly to characterize the church's signs under the Sign Code, but whether the Sign Code itself passes constitutional muster.

II. The Town of Gilbert's Sign Code Is Facially Content-Based Because it Treats Signs Differently Based on Their Content.

The Town of Gilbert regulates the display of outdoor signs with Gilbert Land Development Code, Division 4, General Regulations, Article 4.4 ("Sign Code" or "Code"). *Reed*, 707 F.3d at 1061. The purpose of the Code is to further the interests of safety and aesthetics. J.A. 100 ¶ 24; 139 ¶ 24.

Under the Code, no person is allowed to erect a sign without obtaining a sign permit, unless the sign is exempted. *Id.* at 27-30. The Code outlines nineteen

types of signs that are exempt and thus allowed without a permit. Three exempted signs are "Political Signs," "Ideological Signs," and "Temporary Directional Signs Relating to a Qualifying Event." *Id.* To fall under the last of these sign categories, the sign must "intend [ ] to direct pedestrians, motorists, and other passersby to any assembly, gathering, activity, or meeting sponsored, arranged, or promoted by a religious, charitable, community service, educational, or other similar non-profit organization." *Id.* at 70.

Temporary Directional Signs and Ideological Signs are mutually exclusive under the Code. An Ideological Sign is one that "communicat[es] a message or ideas for non-commercial purposes that is *not* a Temporary Directional Sign Relating to a Qualifying Event." *Id.* at 66-67 (emphasis added). A Political Sign, on the other hand, is a "temporary sign which supports candidates for office or urges action on any other matter on the ballot of primary, general and special elections relating to any national, state or local election." *Id.* at 68.

Under the Code, signs in Gilbert bearing different *content* are treated differently—some far more favorably than others. Regulations governing Ideological Signs and Political Signs, for example, are considerably less restrictive than regulations governing Temporary Directional Signs containing religious expression, such as Good News's signs. Ideological Signs and Political Signs are allowed to be significantly larger and placed in greater density. Moreover, Ideological Signs can be placed indefinitely, and Political Signs may remain in place for longer periods of time before and after the event—an election,

generally—that allows their placement in the first place. *See* Pet. Br. 10-12.

A simple example reveals the content-based nature of Gilbert's Sign Code and how its content-based regulation of speech unfavorably treats religious speech, such as Good News's. If a sign says "Stand Up and Vote for John Smith," it can be up to thirty-two square feet in size and may be placed sixty days before the election. J.A. 84. Most critically, the simple addition of an arrow on this sign ("Stand Up and Vote for John Smith *here* —>") would not change its status as a Political Sign.[5]

By way of contrast, a sign that reads, "Stand Up for Jesus and Worship Him *here* —>," would fall under the Sign Code's definition of a Temporary Directional Sign, and would thus be limited to a size of only six square feet, *less than a fifth* of the "Vote for John Smith" sign. *Id.* at 76. Moreover, while the political sign can be placed up to sixty days in advance of the election event, the religious sign can only be placed twelve hours in advance of the religious event. *Id.*

Thus, despite the fact that both signs are temporary and directional in nature, the *political* sign is treated far more favorably under the Sign Code than the

---

[5] Voting in an election cannot be a "qualifying event," because the *state or local government* arranges the election, not a "religious, charitable, community service, educational, or other similar non-profit organization." J.A. 70. Moreover, unlike an Ideological Sign, a Political Sign is not conditioned on whether it is a Temporary Directional Sign Relating to a Qualifying Event. J.A. 66-68. *See, supra*, p.8.

religious one.[6] The only difference between these two signs is the *content* of each sign's message.[7] This is the epitome of content-based discrimination. As this Court has explained,

> [a]lthough the city may distinguish between the relative value of different categories of commercial speech, *the city does not have the same range of choice in the area of noncommercial speech* to evaluate the strength of, or distinguish between, various

---

[6] The fact that the Sign Code does not ban Good News's religious signs, but only treats them less favorably than political signs, is irrelevant. *See Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653, 2664 (2011) ("The Court has recognized that the distinction between laws burdening and laws banning speech is but a matter of degree and that the Government's content-based burdens must satisfy the same rigorous scrutiny as its content-based bans.") (citations and internal quotation marks omitted).

[7] A sign directing a person *away* from—instead of *to*—an assembly or gathering falls outside the Sign Code's definition of a Temporary Directional Sign. J.A. 70. Thus, Willis Cox's sign proclaiming that "Religion is a Snare and a Racket," *Cox v. New Hampshire*, 312 U.S. 569, 572 (1941), would not be a Temporary Directional Sign under the Code even if it included the message, "Don't waste your time at Good News Community Church, deceiving people at Coronado Elementary School, located *here* —>". An anti-religious sign like this, viewed as an Ideological Sign under the Code, would be treated more favorably in terms of size and duration than a pro-religious sign like Good News's. The Code is thus not only content-based, but viewpoint-based as well. The notion of posting signs to *dissuade* church attendance is not far-fetched. *E.g.*, Laurie Goodstein, "More Atheists Shout it from the Rooftops," NEW YORK TIMES (Apr. 26, 2009) (noting atheist billboards); Matt Coker, "Atheists, Skeptics and Freethinkers Protest Calvary Chapel Creation Conference Today!," OC WEEKLY BLOG (July 24, 2014).

> communicative interests. With respect to noncommercial speech, the city may not choose the appropriate subjects for public discourse. . . . Because some noncommercial messages may be conveyed on billboards throughout the commercial and industrial zones, San Diego must similarly allow billboards conveying other noncommercial messages throughout those zones.

Metromedia, Inc., 453 U.S. at 514-15 (plurality opinion) (internal citations omitted) (emphasis added).

III. The Town of Gilbert's Sign Code Is Content-Based Under This Court's Most Recent Decision Involving a Regulation of Speech: *McCullen v. Coakley*.

Just last term, this Court articulated the standard for determining whether a speech regulation is content-based. *McCullen v. Coakley*, 134 S. Ct. 2518 (2013). In deciding whether an abortion buffer zone law was a content-based restriction on speech, the Court began its analysis with whether the law "draw[s] content-based distinctions *on its face*." *Id.* at 2531 (emphasis added) (citing *Boos v. Barry*, 485 U.S. 312, 315 (1988), and *Carey v. Brown*, 447 U.S. 455, 465 (1980)). It indicated that the law would be content-based "if it required 'enforcement authorities' to 'examine the content of the message that is conveyed to determine whether' a violation has occurred." *Id.* (quoting *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 377, (1984)). In other words, the relevant inquiry is whether application of the law "depends on what [speakers] say"? *Id.* (quoting *Holder v. Humanitarian Law Project*, 561 U.S. 1, 27 (2010)).

Although local governments have wide "leeway" to regulate "features of speech unrelated to . content," *id.* at 2529, they have "no power to restrict expression because of its message, its ideas, its subject matter, *or its content*." *Id.* (quoting *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972) (emphasis added). These constitutional protections are heightened when the venue for speech is "public streets and sidewalks." *Id.* Such locations "have immemorially been held in trust for the use of the public" because, *inter alia*, "they remain one of the few places where a speaker can be confident that he is not simply preaching to the choir." *Id.*

Application of the foregoing principles from *McCullen*, each of which rest upon longstanding precedents of this Court, yields one conclusion: Gilbert's Sign Code is content-based. Like the speech restrictions at issue in *Boos* and *Carey* and other decisions of this Court, the Sign Code facially discriminates based on content, as previously described. *See* Section II, *supra*. Indeed, whether a sign complies with the Code "depends" on what the signs "say," and town officials must necessarily "examine" the contents of a sign to determine its level of favorability under the Code. *McCullen*, 134 S. Ct. at 2531.

If a church posted a sign reading, "Jesus is Lord! Worship Him like we do at First Christian Church!," a Gilbert official would have to parse the contents of the sign to determine whether it is an Ideological Sign—it obviously communicates "a message or idea"—or a Temporary Directional Sign, because it could be construed as an invitation for "pedestrians, motorists,

and other passersby" to visit First Christian Church, even though no address or directions are provided. This investigation into the content of speech, to determine how favorably it should be treated under the Sign Code, reveals that Gilbert's sign regulations are not content-neutral, but content-based.[8]

This Court should hold that the Sign Code is facially content-based under the analysis set forth in *McCullen* and, applying strict scrutiny, rule it unconstitutional.

IV. This Court Should Disavow or Clarify the "Principal Inquiry" Test of *Hill* and *Ward*.

Despite the unassailable notion that the Sign Code is facially content-based, the court below held it to be content-neutral. The court supported its holding with this Court's opinion in *Hill v. Colorado*, and *Hill's* statement that "[t]he principal inquiry in determining content neutrality is whether the government has adopted a regulation of speech ***because of disagreement with the message it conveys***." 530 U.S. at 719 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)) (emphasis added).

Based on *Hill*, the Ninth Circuit held that because Gilbert did not adopt the Sign Code out of disagreement with any particular message, it was content-neutral: "[b]ecause Gilbert's Sign Code *places no restrictions on the particular* ***viewpoints*** *of any*

---

[8] Examples such as this one, where the Code provides insufficient clarity as to what regulatory category a signs falls into, require citizens and officials to play a guessing game, allowing for arbitrary or discriminatory enforcement. *See, e.g.*, *FCC v. Fox TV Stations*, 132 S. Ct. 2307, 2317 (2012).

person or entity that seeks to erect a Temporary Directional Sign and the exemption applies to all, it is content-neutral as that term has been defined by the Supreme Court." *Reed*, 707 F.3d at 1072 (citing *Hill*, 530 U.S. at 719-20) (emphasis added).

This case—complete with its facial myriad of content-based distinctions on speech—demonstrates that this Court should either set aside the *Hill / Ward* "principal inquiry" rubric as a misstatement or, in the alternative, make it clear to the lower courts that, though governmental disagreement with a message might be a *proper* inquiry, "it is not the *only* inquiry." *Hill*, 530 U.S. at 746 (Scalia, J., dissenting) (emphasis in original).

The essential problem with the *Hill / Ward* language is that it invites lower courts to do what the Ninth Circuit did here: bless a facially content-based regulation as content-neutral because the government did not (at least publicly) articulate a discriminatory motive for the regulation. *See, e.g.*, *Thayer v. City of Worcester*, 755 F.3d 60, 68 (1st Cir. 2014) (citing *Hill* for rule that "[e]ven a statute that restricts only some expressive messages and not others may be considered content neutral when the distinctions it draws are justified by a legitimate, non-censorial motive"); *Brown v. Town of Cary*, 706 F.3d 294, 302, 304 (4th Cir. 2013) (rejecting argument that a sign code is necessarily content-based where "a searching inquiry into the content of a particular sign is required," and stating, in light of *Hill*, "we focus our attention on whether the restriction was adopted because of a disagreement with the message conveyed"); *Wag More Dogs, LLC v. Cozart*, 680 F.3d 359, 366 (4th Cir. 2012) (relying on

Hill in stating that "we have not hesitated to deem a regulation content neutral even if it facially differentiates between types of speech"); *Asgeirsson v. Abbott*, 696 F.3d 454, 459-60, n. 6 (5th Cir. 2012) (citing *Ward* and *Hill* for the proposition that "[a] regulation is not content-based merely because the applicability of the regulation depends on the content of the speech. Content-neutrality has continued to be defined by the justification of the law or regulation"); *Palmer v. Waxahachie Indep. Sch. Dist.*, 579 F.3d 502, 509-10 (5th Cir. 2009) (citing *Hill* and *Ward* in holding that school's content-neutral purpose rendered exception for certain messages content-neutral); *Wagner v. City of Garfield Heights*, No. 13-3474, 2014 U.S. App. LEXIS 15984, *16 (6th Cir. Aug. 19, 2014) ("'content based' is a term of art that refers to a distinction based on content because of an impermissible purpose").

This Court has long recognized a difference between viewpoint-based and content-based restrictions on speech. *See Pleasant Grove City*, 555 U.S. at 469 ("[A]ny restriction based on the *content* of the speech must satisfy strict scrutiny, that is, the restriction must be narrowly tailored to serve a compelling government interest, and restrictions based on *viewpoint* are prohibited.") (citations omitted) (emphasis added); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) ("Viewpoint discrimination is thus an egregious form of content discrimination.").[9] And, with this distinction in mind,

---

[9] Stated simply, "[v]iewpoint discrimination is a subset of content discrimination; all viewpoint discrimination is first content discrimination, but not all content discrimination is viewpoint

this Court has made it clear that a regulation of speech can be viewpoint-neutral but nonetheless content-based. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 345 (1995) ("Even though this provision applies evenhandedly to advocates of differing viewpoints, it is a direct regulation of the content of speech."); *Boos*, 485 U.S. at 319-20 (noting that though a speech restriction might be *viewpoint*-neutral that "does not render [it] *content*-neutral.") (emphasis added). Thus, this Court has "time and again rejected the argument that viewpoint-neutrality equals content-neutrality." *Capital Area Right to Life, Inc. v. Downtown Frankfort, Inc.*, 511 U.S. 1135 (1994) (O'Connor, J., dissenting from denial of certiorari) (citations omitted).

However, due to the *Hill / Ward* "principal inquiry" language, lower courts, such as the Ninth Circuit here, are confusing content-based restrictions on speech with viewpoint-based restrictions, requiring a party challenging a facially content-based law to demonstrate a viewpoint-based purpose behind it.[10] Parties challenging speech regulations under the First Amendment should not have to carry this burden. *See*,

---

discrimination." 1 Rodney A. Smolla, SMOLLA AND NIMMER ON FREEDOM OF SPEECH § 3:9 (1998).

[10] As one scholar observed, describing the language from *Ward* as used in *Hill*, "[t]he Court says in sloppy language that the question of content neutrality has to do with whether the government is suppressing speech because of disagreement with its message. But that turns content neutrality into viewpoint neutrality. The Court simply elided the difference between content and viewpoint and pretended that this was a statute which was content-neutral." Michael W. McConnell, *Colloquium, Professor Michael W. McConnell's Response*, 28 PEPP. L. REV. 747, 749 (2001).

e.g., *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 117 (1991) (rejecting argument that discriminatory treatment "is suspect under the First Amendment only when the [government] intends to suppress certain ideas"); *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 592 (1983) ("Illicit legislative intent is not the *sine qua non* of a violation of the First Amendment. We have long recognized that even regulations aimed at proper governmental concerns can restrict unduly the exercise of rights protected by the First Amendment.") (citations omitted).

The principal danger in the *Hill/Ward* line of reasoning is that governments can mask their hostility to certain forms of noncommercial speech with professions of benignity. But speech remains a fundamental right, regardless of whether the government is hostile, patronizing, or indifferent toward that speech. That is why facially content-based regulations trigger strict scrutiny irrespective of governmental purpose. *See Turner Broadcasting System v. FCC*, 512 U.S. 622, 642-43 (1994) ("[W]hile a content-based purpose may be sufficient to show that a regulation is content-based, it is not necessary to such a showing in all cases. Nor will the mere assertion of a content-neutral purpose be enough to save a law which, on its face, discriminates based on content").[11] Applying strict scrutiny to facially content-

---

[11] *See also Cincinnati v. Discovery Network*, 507 U.S. 410, 429 (1993) ("Regardless of the *mens rea* of the city, it has enacted a sweeping ban on the use of newsracks that distribute 'commercial handbills,' but not 'newspapers.' Under the city's newsrack policy, whether any particular newsrack falls within the ban is

based restrictions on speech effectively addresses those cases where governments successfully hide their discriminatory motives; a "purpose" test would fail to catch such cases.

Whether this Court should set aside, or at least cabin, the *Hill/Ward* "principal inquiry" test is answered *sub silentio* by this Court's *McCullen* decision. Despite the factual and legal similarities between the abortion buffer zone law at issue in *McCullen* and the buffer zone law in *Hill*, the Court in *McCullen* nowhere mentions *Hill*, let alone its "principal inquiry" language, in its legal analysis. And while the Court invoked *Ward* elsewhere in its opinion, *McCullen*, 134 S. Ct. at 2529, 2531, it nowhere mentions or applies the "principal inquiry" language that *Hill* borrowed from *Ward*.[12]

---

determined by the content of the publication resting inside that newsrack. Thus, by any commonsense understanding of the term, the ban in this case is 'content based.'"). *Cf. Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993) (explaining that the Court "must begin with [the law's] text, for the minimum requirement of neutrality [under the Free Exercise Clause] is that a law not discriminate on its face"); *International Union v. Johnson Controls, Inc.*, 499 U.S. 187, 199 (1991) (under Title VII, "the absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect").

[12] In *Ward*, there was no facial content discrimination, so *in context*, the only issue in that case was discriminatory purpose. The problem is that *Hill* essentially took *Ward* out of context and used it to deem content-neutral what was in fact a facially content-based restriction. In so doing, *Hill* distorted the *Ward* test, changing it from being the standard for the *facially neutral subset*

The Court should affirmatively say here what it implicitly said in *McCullen*: government disagreement with a message, under the *Hill / Ward* rubric, is not the "principal inquiry," much less a required element, for a determination that a speech regulation is content-based. Rather, this Court should hold—in fact, reaffirm—that, for purposes of the First Amendment, a regulation on speech is content-based when it is *either* content-discriminatory on its face[13] *or* content-hostile (or just content-discriminatory, even if benign) in its purpose. *See Bartnicki v. Vopper*, 532 U.S. 514, 528 & n.9 (2001). Thus, a content-based text *or* purpose will trigger strict scrutiny.

This Court should revisit the "principal inquiry" rationale of *Hill / Ward* and either formally eschew it in this and future cases, or reconfigure it in light of this Court's more firmly established precedents.

CONCLUSION

For the foregoing reasons, the judgment of the Ninth Circuit should be reversed.

---

of cases to being the governing standard for content-neutrality *in all cases*.

[13] *See City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 448 (2002) (Kennedy, J., concurring in the judgment) ("[W]hether a statute is content neutral or content based is something that can be determined on the face of it; if the statute describes speech by content then it is content based.").

Respectfully submitted,

Jay Alan Sekulow
Counsel of Record
Stuart J. Roth
Jordan A. Sekulow
Colby M. May
Walter M. Weber
Geoffrey R. Surtees
AMERICAN CENTER FOR LAW
& JUSTICE
201 Maryland Ave., N.E.
Washington, D.C. 20002
(202) 546-8890
sekulow@aclj.org

Mark Goldfeder
CENTER FOR THE STUDY OF LAW
AND RELIGION
EMORY UNIVERSITY SCHOOL OF LAW
Gambrell Hall, Suite 310
1301 Clifton Rd. NE
Atlanta, GA 30322
(404) 712-0213

Counsel for Amicus Curiae

SEPTEMBER 22, 2014

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
SEP 22 2014
OFFICE OF THE CLERK

No. 13-502

In the Supreme Court of the United States

PASTOR CLYDE REED AND
GOOD NEWS COMMUNITY CHURCH,
Petitioners,

v.

TOWN OF GILBERT, ARIZONA AND ADAM ADAMS, IN HIS OFFICIAL CAPACITY AS CODE COMPLIANCE MANAGER,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE BECKET FUND FOR RELIGIOUS LIBERTY IN SUPPORT OF PETITIONERS

ERIC C. RASSBACH
Counsel of Record
MARK L. RIENZI
DIANA M. VERM
The Becket Fund for Religious Liberty
3000 K St., NW Ste. 220
Washington, DC 20007
erassbach@becketfund.org
(202) 955-0095

Counsel for Amicus Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

Does the First Amendment's rule against content discrimination require plaintiffs to prove intentional discrimination or targeting?

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

INTEREST OF THE AMICUS 1

INTRODUCTION AND SUMMARY OF THE ARGUMENT 2

ARGUMENT 4

I. The First Amendment's rule against content discrimination does not require plaintiffs to prove intentional discrimination or targeting 4

A. The First Amendment does not require a plaintiff to demonstrate intentional discrimination or targeting in order to prove content discrimination. 5

B. Intentional discrimination or targeting is sufficient but not necessary to prove content discrimination. 5

C. Similar constitutional and statutory protections do not require plaintiffs to demonstrate intent. 7

1. Other Bill of Rights protections such as Free Exercise and Due Process do not require plaintiffs to prove intentional discrimination or targeting. 7

2. Congress has frequently rejected an intent element in civil rights statutes. 9

II. Requiring plaintiffs to prove intentional discrimination or targeting would be especially harmful towards minority religious groups. 12

III. Lower court errors will continue unless this Court clearly states that intent is not required to prove content discrimination. 16

A. The Court's secondary effects cases are the source of the Ninth Circuit's ruling that content discrimination includes an intent element. 16

B. The Court can eliminate doctrinal drift by clearly holding that intent is not required to prove content discrimination. 18

CONCLUSION 19

TABLE OF AUTHORITIES

Cases

Axson–Flynn v. *Johnson*,
356 F.3d 1277 (10th Cir. 2004) 8

Bd. of Educ. of Cent. Sch. Dist. No. 1 v. *Allen*,
392 U.S. 236 (1968) 4

Brown v. *Entertainment Merchants Ass'n*,
131 S. Ct. 2729 (2011) 19

C.H. ex rel. Z.H. v. *Oliva*,
226 F.3d 198 (3d Cir. 2000) 1

Central Rabbinical Congress of the U.S. & Canada v. *New York City Dep't of Health & Mental Hygiene*,
--- F.3d ---, 2014 WL 3973156 (2d Cir. 2014) 9

Church of the Lukumi Babalu Aye, Inc. v. *City of Hialeah*,
508 U.S. 520 (1993) 8

City of Cincinnati v. *Discovery Network, Inc.*,
507 U.S. 410 (1993) 5

City of Mobile v. *Bolden*,
446 U.S. 55 (1980) 10

City of Renton v. *Playtime Theatres, Inc.*,
475 U.S. 41 (1986) 16, 17

Colo. Christian Univ. v. *Weaver*,
534 F.3d 1245 (10th Cir. 2008) 13

Employment Div. v. *Smith*,
494 U.S. 872 (1990) 8

FCC v. *Fox Television Stations, Inc.*,
132 S. Ct. 2307 (2012) 9

FCC v. *League of Women Voters of Cal.*,
468 U.S. 364 (1984) 5

Grayned v. *City of Rockford*,
408 U.S. 104 (1972) 9

Hill v. *Colorado*,
530 U.S. 703 (2000) 18

Kavakçı v. *Turkey*,
App. No. 71907/01 [ECtHR 2007 – Section III] 1

Madsen v. *Women's Health Ctr., Inc.*,
512 U.S. 753 (1994) 18

McCullen v. *Coakley*,
134 S. Ct. 2518 (2014) 5, 18

Moxley v. *Town of Walkersville*,
601 F. Supp. 2d 648 (D. Md. 2009) 14

Murdock v. *Commonwealth of Pennsylvania*,
319 U.S. 105 (1943) 12

Ohio Gov't Risk Management Plan v. *Harrison*,
874 N.E.2d 1155 (Ohio 2007) 19

Reaching Hearts Int'l, Inc. v. *Prince George's Cnty.*,
584 F. Supp. 2d 766 (D. Md. 2008) 14, 15

Rosenberger v. *Rector and Visitors of Univ. of Va.*,
515 U.S. 819 (1995) 4, 7

Satawa v. *Macomb Cnty. Rd. Comm'n*,
689 F.3d. 506 (6th Cir. 2012) 13, 14

Shrum v. *City of Coweta, Okla.*,
449 F.3d 1132 (10th Cir. 2006) 8

Sorrell v. *IMS Health Inc.*,
131 S. Ct. 2653 (2011) 5, 6

Sts. Constantine and Helen Greek Orthodox Church, Inc. v. *City of New Berlin*,
396 F.3d 895 (7th Cir. 2005) 15

Thornburg v. *Gingles*,
478 U.S. 30 (1986) 10

Thornhill v. *State of Ala.*,
310 U.S. 88 (1940) 8

Tong v. *Chicago Park District*,
316 F.Supp.2d 645 (N.D. Ill. 2004) 1

Turner Broadcasting Sys., Inc. v. *FCC*,
512 U.S. 622 (1994) 18

United States v. *Alvarez*,
132 S. Ct. 2537 (2012) 5

United States v. *O'Brien*,
391 U.S. 367 (1968) 6

United States v. *Virginia*,
518 U.S. 515 (1996) 13

United States v. *Williams*,
553 U.S. 285 (2008) 9

Utah Highway Patrol Ass'n v. *Am. Atheists, Inc.*,
637 F.3d 1095 (10th Cir. 2010) 2

Ward v. *Rock Against Racism*,
491 U.S. 781 (1989) 17

Statutes

42 U.S.C. § 2000cc 11

42 U.S.C. § 2000cc 11

42 U.S.C. § 2000cc-1 11

52 U.S.C. § 10301 10

Pub. L. 97-205 10

Other Authorities

146 Cong. Rec. 16,698-16,699 (2000) (joint statement of Senator Hatch and Senator Kennedy) 12

Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DePaul L. Rev. 993 (1990) 4

H.R. Rep. No. 106-219 (1999) 12

H.R. Rep. No. 109-478 10

Mark Rienzi and Stuart Buck, *Neutral No More: Secondary Effects Analysis and the Quiet Demise of the Content-Neutrality Test*, 82 Fordham L. Rev. 1187 (2013) 16, 17, 18

Roman P. Storzer and Blair Lazarus Storzer, *Christian Parking, Hindu Parking: Applying Established Civil Rights Principles to RLUIPA's Nondiscrimination Provision*, 16 Rich. J.L. & Pub. Int. 295 (2013) 15

S. Rep. No. 97-417 10

INTEREST OF THE AMICUS[1]

The Becket Fund for Religious Liberty is a non-profit, public-interest legal and educational institute that protects the free expression of all faiths. The Becket Fund has represented agnostics, Buddhists, Christians, Hindus, Jews, Muslims, Santeros, Sikhs, and Zoroastrians, among others, in lawsuits across the country and around the world. The Becket Fund believes that because the religious impulse is natural to human beings, public and private religious expression is natural to human culture.

The Becket Fund has long advocated for robust protections of religious speech in public discourse. For example, The Becket Fund has defended private religious speech by an elementary school student, *C.H. ex rel. Z.H.* v. *Oliva*, 226 F.3d 198 (3d Cir. 2000) (en banc), *cert. denied sub nom. Hood* v. *Medford Township Bd. of Educ.*, 533 U.S. 915 (2001); defended private religious speech in a municipal "buy-a-brick" program in a public park, *Tong* v. *Chicago Park District*, 316 F.Supp.2d 645 (N.D. Ill. 2004) (represented family whose brick was excluded from the park because it included religious language); defended a Turkish member of parliament's right to religious expression by wearing a *hijab* while serving in Parliament, *Kavakçı* v. *Turkey*, App. No. 71907/01 [ECtHR 2007 – Section III] (counsel to applicant); and defended private speech in a roadside public forum, *Utah Highway Patrol Ass'n* v. *American Atheists, Inc.*, 637 F.3d 1095 (10th Cir.

---

[1] No party's counsel authored any part of this brief. No person other than the *Amicus Curiae* contributed money intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief, and letters indicating consent have been filed with the Clerk.

2010), *cert. denied*, 132 S. Ct. 12 (2011) (represented states of Colorado, Kansas, New Mexico, and Oklahoma in seeking to keep open public fora for private religious speech).

The Becket Fund is concerned that the Ninth Circuit, like some other courts of appeals, now requires plaintiffs to prove intentional discrimination or targeting in order to make out a free speech claim based on content discrimination. The Becket Fund believes that reading an intent requirement into the First Amendment rule against content discrimination would weaken that rule and harm religious minorities.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Intentional discrimination is hard to prove. As with any state of mind question, it requires a great deal of circumstantial evidence to be brought before a judge or jury for factfinding and cannot normally be decided on the pleadings.

Intentional discrimination is especially hard to prove when the government entity engaged in discrimination or targeting is careful to cover its tracks. That is why the Town of Gilbert, like other municipalities, has fought so hard to have intentional discrimination treated as an element of a content discrimination claim under the First Amendment. Unlike municipalities that openly and enthusiastically discriminated against African-Americans in the Southern states of the 1960s, few municipalities today would admit that they are intentionally discriminating against minority groups, even unpopular religious minorities. The Ninth Circuit's rule would make it very difficult for religious plaintiffs to prevail on a speech claim even

when intentional discrimination really is present. Indeed, in most cases a jury would have to decide that the municipal defendant intended to discriminate against the religious plaintiff.

But the First Amendment's rule against content discrimination does not require plaintiffs to prove intent to discriminate or the presence of animus. To be sure, intentional discrimination is often *sufficient* to prove a First Amendment violation. But it is hardly *necessary*. That is in part because the rule against content discrimination is a structural rule like the rule against prior restraints or the rule against unbridled discretion: Some categories of municipal policies are so prone to result in unequal treatment or conceal hidden discrimination that they are always constitutionally suspect. Indeed, this way of interpreting the rule against content discrimination comports with many other constitutional and statutory civil rights protections that do not require plaintiffs to prove intentional discrimination.

Unfortunately, lower courts have often held that content discrimination is permissible as long as the government has a good reason to discriminate. Given the confusion on this issue, both the lower courts and religious minorities would benefit from a clear holding that discriminatory intent is not necessary to prove a claim of content discrimination. Failing to adopt a clear rule would only result in more creative lawyering by municipalities and require the Court to revisit the issue again in the future. But a clear rule would ensure full protection of minority religious views.

ARGUMENT

I. The First Amendment's rule against content discrimination does not require plaintiffs to prove intentional discrimination or targeting.

The First Amendment does not require a plaintiff to prove intentional discrimination or targeting—or what the Ninth Circuit called "illicit motive," Pet. App.96a—in order to prevail upon a content discrimination claim.[2] This Court has repeatedly held that such proof is unnecessary.

---

[2] In this brief, *Amicus* uses the Court's term "content discrimination," see, *e.g.*, *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995), rather than the terms "content-neutral" and "content-based," because the term "content-neutral" is ambiguous. As Justice Harlan noted in *Board of Education of Central School District No. 1* v. *Allen*, 392 U.S. 236 (1968), "[n]eutrality is * * * a coat of many colors." *Id.* at 249 (Harlan, J., concurring) (noting the many meanings of neutrality). See also Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DePaul L. Rev. 993, 994 (1990) ("Those who think neutrality is meaningless have a point. We can agree on the principle of neutrality without having agreed on anything at all."). In the context of facial content discrimination, the term "content-neutral" leads some lower courts astray because they believe the command of neutrality concerns only factors other than the subject matter of the speech at issue, such as the identity of the speaker, particular viewpoints, or the intent of government officials in enacting or enforcing the challenged rule. See, *e.g.*, *Reed*, 707 F.3d at 1072 ("Because Gilbert's Sign Code places no restrictions on the particular viewpoints of any person or entity * * * it is content-neutral as that term has been defined by the Supreme Court.")

A. The First Amendment does not require a plaintiff to demonstrate intentional discrimination or targeting in order to prove content discrimination.

This Court has repeatedly held that a government policy constitutes content discrimination "if it require[s] 'enforcement authorities' to 'examine the content of the message that is conveyed to determine whether'" a violation [of the policy] has occurred." *McCullen* v. *Coakley*, 134 S. Ct. 2518, 2531 (2014) (quoting *FCC* v. *League of Women Voters of Cal.*, 468 U.S. 364, 383 (1984)). A requirement that a municipal official look inside the four corners of the citizen's message in order to decide how to classify the speech is enough to trigger strict scrutiny. See, *e.g.*, *Sorrell* v. *IMS Health Inc.*, 131 S. Ct. 2653, 2663 (2011) (differential treatment of "educational communications" and "marketing" constituted content discrimination); *City of Cincinnati* v. *Discovery Network, Inc.*, 507 U.S. 410, 418, 420 (1993) ("categorical prohibition" on "commercial handbills" while allowing "newspapers" constituted content discrimination); *United States* v. *Alvarez*, 132 S. Ct. 2537, 2546-47 (2012) (categorical prohibition on "false speech" while allowing "analogous true speech" constituted content discrimination); see also Pet. Br. 22-25 (describing rule against content discrimination).

B. Intentional discrimination or targeting is sufficient but not necessary to prove content discrimination.

Although intentional discrimination is not *necessary* to prove content discrimination, it is often *sufficient* to do so. *Sorrell* is a prime example of this feature of speech jurisprudence. In *Sorrell*, Vermont enacted a

law that effectively prohibited the sale of prescriber-identifying information for "marketing" purposes, but allowed it for "educational communications" and other purposes. 131 S. Ct. at 2663. The challenged statute also distinguished among the purchasers of prescriber-identifying information, specifically forbidding sales of that information to pharmaceutical manufacturers.

Sorrell distinguished between the challenged law's purpose and its facial effects: "Formal legislative findings accompanying § 4631(d) confirm that the law's express purpose and practical effect are to diminish the effectiveness of marketing by manufacturers of brand-name drugs. Just as the 'inevitable effect of a statute on its face may render it unconstitutional,' a statute's stated purposes may also be considered." *Ibid.* (quoting *United States* v. *O'Brien*, 391 U.S. 367, 384 (1968)). Thus "[g]iven the legislature's expressed statement of purpose, it is apparent that § 4631(d) imposes burdens that are based on the content of speech *and* that are aimed at a particular viewpoint." *Id.* at 2663-64 (emphasis added). The Court further concluded that the "statute disfavors specific speakers, namely pharmaceutical manufacturers." *Id.* at 2663.

The Court thus set out different ways that the same statute had violated the rule against content discrimination. On one hand, the legislature's expressed purpose indicated that it was engaged in intentional discrimination among categories of content, as well as viewpoint discrimination. But the "effect of a statute on its face" was a separate infirmity of the Vermont statute, as was the statute's discrimination among speakers. Thus, the Vermont statute triggered strict scrutiny in four independent ways: (1) intentional content discrimination (apparent from the express purpose); (2) viewpoint discrimination (also apparent from

the purpose); (3) facial content discrimination (apparent from the face of the statute); and (4) discrimination among speakers (apparent from the provision specially barring pharmaceutical manufacturers).

The Town would have these independent First Amendment violations subsumed into a single category. But this Court has never held that all forms of content discrimination can be collapsed into a single category of viewpoint discrimination. Rather, "[v]iewpoint discrimination is * * * an egregious form of content discrimination." *Rosenberger*, 515 U.S. at 829; see also *id.* at 829-30 (noting distinction between content and viewpoint discrimination in the context of a limited public forum). It would stand First Amendment jurisprudence on its head to allow the narrower category of viewpoint discrimination to swallow the far broader category of content discrimination.

C. Similar constitutional and statutory protections do not require plaintiffs to demonstrate intent.

The First Amendment's rule against content discrimination is hardly unique in eschewing an intent requirement. Similar constitutional and statutory civil rights protections also do not include an intent element.

1. Other Bill of Rights protections such as Free Exercise and Due Process do not require plaintiffs to prove intentional discrimination or targeting.

A number of other constitutional protections also do not require a showing of intentional discrimination or targeting in order for a plaintiff to make out her

claim.[3] For example, the Free Exercise Clause does not focus on whether a government official had intent to discriminate, but whether the government laws or actions at issue were both "neutral" and "generally applicable." *Employment Div.* v. *Smith*, 494 U.S. 872, 880 (1990). Thus the courts of appeals have held that "[p]roof of hostility or discriminatory motivation may be sufficient to prove that a challenged governmental action is not neutral, but the Free Exercise Clause is not confined to actions based on animus." *Shrum* v. *City of Coweta, Okla.*, 449 F.3d 1132, 1145 (10th Cir. 2006) (McConnell, J.) (citing *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 533 (1993); *Axson–Flynn* v. *Johnson*, 356 F.3d 1277, 1294 (10th Cir. 2004)). "[C]lose scrutiny of laws singling out a religious practice for special burdens is not limited to the context where such laws stem from animus, pure and simple. Instead, '[a] law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny.'" *Central Rabbinical Congress of the U.S. & Canada* v. *New York City Dep't of Health & Mental Hygiene*, --- F.3d

---

[3] There is also a similarity to several of the other protections subsumed under the First Amendment's Free Speech Clause. Like the rule against prior restraints and the rule against granting unbridled discretion to municipal officials, the rule against content discrimination can be thought of as a *structural* protection. Structural protections prohibit certain types of government regulation not because they suppress speech in every instance, but because their *structures* inherently lend themselves to abuse by government officials. Not only are such legal structures easily abused, they are also difficult to challenge in court after-the-fact. Cf. *Thornhill* v. *State of Ala.*, 310 U.S. 88, 97–98 (1940) (penal statute lacking objective criteria "readily lends itself to harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure").

---, 2014 WL 3973156, at *11 (2d Cir. 2014) (quoting *Lukumi*, 508 U.S. at 546; alteration in original).

Similarly, the Due Process Clause of the Fifth Amendment "requires the invalidation of laws that are impermissibly vague[,]" regardless of whether those laws were enacted with the intent to discriminate or to target a particular group. *FCC* v. *Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012). A conviction or punishment fails to comply with due process if the statute or regulation under which it is obtained "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *Ibid.* (quoting *United States* v. *Williams*, 553 U.S. 285, 304 (2008)). The ills to be prevented are both arbitrary (*i.e.* unintentional) government action and discriminatory (*i.e.* intentional) government action: "precision and guidance are necessary so that those enforcing the law do not act in an arbitrary *or* discriminatory way. *Ibid.* (emphasis added) (citing *Grayned* v. *City of Rockford*, 408 U.S. 104, 108–09 (1972)).

Content discrimination works in the same way. *Both* the intentional *and* the merely arbitrary (and thus unintentional) forms of government discrimination against specific categories of content trigger strict scrutiny. There is no reason content discrimination should be an anomaly.

2. Congress has frequently rejected an intent element in civil rights statutes.

Congress has frequently ensured that civil rights statutes cover not only intentional government discrimination, but also government actions that result in unequal treatment. For example, in *City of Mobile* v.

Bolden, 446 U.S. 55 (1980), this Court limited the original version of Section 2 of the Voting Rights Act to cases of intentional discrimination. *Id.* at 61-62. Congress responded by amending Section 2 to state that "[n]o voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision *in a manner which results in* a denial or abridgement of the right of any citizen of the United States to vote on account of race or color * * * " 52 U.S.C. § 10301(a) (emphasis added), amended by Pub. L. 97-205, § 3, June 29, 1982, 96 Stat. 134; see also H.R. Rep. No. 109-478, at 10 (2006) (Committee Statement on the Right to Vote and the Voting Rights Act of 1965) (recounting history of the 1982 amendments). As the Court later summarized: "The intent test was repudiated for three principal reasons—it is 'unnecessarily divisive because it involves charges of racism on the part of individual officials or entire communities,' it places an 'inordinately difficult' burden of proof on plaintiffs, and it 'asks the wrong question.'" *Thornburg* v. *Gingles*, 478 U.S. 30, 44 (1986) (quoting S. Rep. No. 97-417, at 36 (1982)). "The 'right' question * * * is whether 'as a result of the challenged practice or structure plaintiffs do not have an equal opportunity to participate in the political processes and to elect candidates of their choice.'" *Ibid.* (quoting S. Rep. No. 97-417, at 28; other citation omitted). Congress thus decided that it was extremely important in protecting voting rights to focus not just on the presence of discriminatory intent, but also on the presence of unequal treatment.

Another civil rights statute, the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), reflects a similar judgment on the part of

Congress. In RLUIPA, Congress enacted several provisions that protect the rights of prisoners to exercise their faith in prison, and the right of religious assemblies to use land for religious purposes, all without regard to the intent of the relevant government officials. In the prisoner provisions, Congress provided that "[n]o government shall impose a substantial burden on the religious exercise of [a prisoner]." 42 U.S.C. § 2000cc-1. There is no inquiry into the intent or motive of prison officials in making that determination.

Similarly, in RLUIPA's land use provisions, Congress included five separate protections: (1) a no-substantial-burden provision, 42 U.S.C. § 2000cc(a), which is similar to the prisoner provision; (2) an "equal terms" provision, 42 U.S.C. § 2000cc(b)(1), which prohibits municipal governments from treating religious assemblies "on less than equal terms" than non-religious assemblies; (3) a "non-discrimination" provision, 42 U.S.C. § 2000cc(b)(2), which prohibits municipalities from "discriminat[ing] against any assembly or institution on the basis of religion or religious denomination"; (4) a "total exclusion" provision, 42 U.S.C. § 2000cc(b)(3)(A), which prohibits municipalities from excluding all religious land uses from their jurisdiction; and (5) an "unreasonable limitations" provision, 42 U.S.C. § 2000cc(b)(3)(B), which prohibits unreasonable limitations on religious land use within a particular jurisdiction. Of these five separate protections, the only provision where intent is relevant is the "non-discrimination" protection, which governs unintentional as well as intentional discrimination. The other four—such as the "equal terms provision"—do not consider intent, but focus instead on unequal treatment.

Congress intentionally left intent out of RLUIPA. The reason was that, as with the Voting Rights Act,

discrimination is hard to prove. For example, "new, small, or unfamiliar churches * * * are frequently discriminated against" in zoning and land use decisions, but "the highly individualized and discretionary processes" of approvals and variances "make it difficult to prove discrimination in any individual case." 146 Cong. Rec. 16,698-16,699 (2000) (joint statement of Senator Hatch and Senator Kennedy). More often than not, "discrimination against small and unfamiliar denominations" is covert and "lurks behind such vague and universally applicable reasons as traffic, aesthetics, or 'not consistent with the city's land use plan.'" *Ibid.*; see also H.R. Rep. No. 106-219, at 24 (1999) ("Land use regulation has a disparate impact" on "[s]maller and less mainstream denominations," but "discrimination can be very difficult to prove.").

Of course the scope of constitutional rights does not necessarily track the scope of analogous civil rights statutes. Yet the distinction between intentional and unintentional discrimination that flows through these civil rights statutes does demonstrate a natural dividing line between intent-focused and intent-indifferent civil rights protections. The rule against content discrimination has variants that fall on both sides of that line.

II. Requiring plaintiffs to prove intentional discrimination or targeting would be especially harmful towards minority religious groups.

Perhaps ironically, imposing an intent requirement would be the most harmful to those who tend to be most frequent targets of intentional discrimination—disfavored minority groups, including minority religious groups. See, *e.g.*, *Murdock* v. *Commonwealth of Pennsylvania*, 319 U.S. 105, 876 (1943) (otherwise

neutral licensing requirements for door-to-door soliciting would constitute "a new device for the suppression of religious minorities"). Government officials who want to discriminate against certain categories of speech content typically know discrimination is prohibited and thus attempt to hide their discriminatory actions. It is in these situations that a rule requiring proof of intent is the most injurious, because it turns on facts not easily revealed in discovery or discerned by courts—namely, the mental state of government officials.

1. Government officials do not typically announce their intent to discriminate against certain categories of speech. Instead they try to hide discrimination behind seemingly neutral policies, and often offer post-hoc rationalizations for their behavior. This is why in a host of contexts where discrimination is covert, this Court has "instruct[ed] that 'benign' justifications proffered in defense of categorical exclusions will not be accepted automatically; a tenable justification must describe actual state purposes, not rationalizations for actions in fact differently grounded." *United States* v. *Virginia*, 518 U.S. 515, 535-36 (1996); cf. *Colo. Christian Univ.* v. *Weaver*, 534 F.3d 1245, 1268 (10th Cir. 2008) (McConnell, J.) ("We cannot and will not uphold [government action] that abridges an enumerated constitutional right on the basis of a factitious governmental interest found nowhere but in the defendants' litigating papers.").

2. The urge to conceal true motivations is no less present in cases involving religious speech. For example, in *Satawa* v. *Macomb County Road Commission*, 689 F.3d. 506 (6th Cir. 2012), the Sixth Circuit confronted a municipality's efforts to keep a private crèche from being displayed on the median of a highway. The

municipality told the courts that the reason was safety, but "there was no indication that safety concerns played *any* role in the Board's decision. Quite the contrary. Even though Satawa's permit application specifically claimed that the crèche did not obstruct traffic or pose 'any other safety concerns,' [the Chairperson's] letter denying the permit only addressed religion." *Id.* at 523 (emphasis in original). "[T]he district court should have * * * drawn the reasonable inference that the Board's self-serving (but still questionable) litigation documents were designed to conceal its real reason for denying the permit: the crèche's religious content." *Id.* at 524.

Other examples where municipalities have attempted to mask discrimination against disfavored religious minorities—particularly from the context of religious land use litigation—abound. For example, in *Moxley* v. *Town of Walkersville*, 601 F. Supp. 2d 648 (D. Md. 2009), a group of Ahmadi Muslims announced that they planned to purchase land in an agricultural zone in a rural part of Maryland. The county commissioners not long after passed an ordinance excluding all houses of worship from the agricultural zone, not even allowing for special exceptions—an ostensibly neutral rule. *Id.* at 653. One of the commissioners who was to rule on the Muslims' application "advised [mosque opponents] about how to approach the public hearings on the [mosque's] petition, including refraining from using 'terms like Muslim, those individuals, religion etc.,' and how many people should testify." *Id.* at 654.

Similarly, in *Reaching Hearts International, Inc.* v. *Prince George's County*, 584 F. Supp. 2d 766 (D. Md. 2008), *aff'd*, 368 Fed. Appx. 370 (3d Cir. 2010), the County enacted a bill that made it impossible for the

church to build on its land: "The restriction contained in the bill was just large enough to encompass all of [the Church's] property and, even the drafter of the bill testified that he did not know of any other property in that district (*i.e.* Councilman Dernoga's district) that would have been impacted by the bill other than the property of [the Church]." *Id.* at 783. The district court concluded that "it is clear that Defendant engaged [the Church] in a fruitless three-year-long shadowboxing match that was doomed from the start." *Id.* at 784. This type of "shadowboxing" is typical of cases where there is hidden discrimination. See also *Sts. Constantine and Helen Greek Orthodox Church, Inc.* v. *City of New Berlin*, 396 F.3d 895, 899, 901 (7th Cir. 2005) (Posner, J.) ("The repeated legal errors [in processing Church's land use application] by the City's officials casts doubt on their good faith"; rejecting new trial due to "whiff of bad faith" on the part of the defendant city.).[4]

3. The factual history of this case involves a similar attempt by the government to discriminate against a disfavored group while masking its intent in neutral-sounding language. Pet. Br. 13-16 (describing the history of the sign ordinance). Although the Town made several changes to the ordinance, and the ostensible rationales varied from change to change, the one constant was that the Church's signs were treated on less than equal terms with signs containing non-religious ideology. *Ibid.* When the only constant variable is unequal treatment—particularly after a complaint has

---

[4] A number of other examples of hidden discrimination in religious land use cases are collected in Roman P. Storzer and Blair Lazarus Storzer, *Christian Parking, Hindu Parking: Applying Established Civil Rights Principles to RLUIPA's Nondiscrimination Provision*, 16 Rich. J.L. & Pub. Int. 295 (2013).

been raised—this gives rise to an inference of intentional discrimination. See Pet. Br. at 36 n.10 (describing intentional discrimination).

Yet it is precisely the fact that an inference must be made—and made by the finder of fact—that a requirement of intentional discrimination is so troubling in the context of a content discrimination claim. If every content discrimination claim required proof of discriminatory intent, the rule against content discrimination would have little practical force.

III. Lower court errors will continue unless this Court clearly states that intent is not required to prove content discrimination.

This case presents an important opportunity for the Court to clarify the law governing claims of content discrimination. The lower courts would benefit immensely from a clear statement that content discrimination—with or without intentional discrimination—merits strict scrutiny.

A. The Court's secondary effects cases are the source of the Ninth Circuit's ruling that content discrimination includes an intent element.

The ultimate source of the split before the Court in this appeal is the line of cases that began with the Court's "secondary effects" decision in *City of Renton* v. *Playtime Theatres, Inc.*, 475 U.S. 41 (1986).[5] In *Renton*, the Court held that because the defendant city's

---

[5] A detailed analysis of this decades-long doctrinal drift is set forth in Mark Rienzi and Stuart Buck, *Neutral No More: Secondary Effects Analysis and the Quiet Demise of the Content-Neutrality Test*, 82 Fordham L. Rev. 1187 (2013).

"'*predominate* concerns' were with the *secondary effects* of adult theaters, and not with the content of adult films themselves[,]" the city's regulation of adult theaters was content-neutral. *Id.* at 47 (second emphasis added). The Court went on to hold that the city's reliance on secondary effects meant that the rule was "justified without reference" to the content of the adult theaters' films. *Id.* at 48. This approach marked a significant deviation from the Court's typical content-neutrality approach. By subtly shifting the focus of the neutrality inquiry from the challenged regulation (and whether it relied on the content of messages) *to* whether the defendant was pursuing a neutral purpose, *Renton* muddied the waters of content discrimination law considerably.

Three years later, the Court expanded *Renton*'s twisting of the content discrimination test. In *Ward* v. *Rock Against Racism*, the Court held:

> The principal inquiry in determining content-neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. The government's purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others.

491 U.S. 781 (1989) (internal citations omitted). This phrasing elevated the purpose inquiry far beyond any role it had played in traditional content-neutrality analysis. See Rienzi & Buck, 82 Fordham L. Rev. at 1211-15 (explaining differences).

Since *Ward* was decided, this Court has decided four cases in which it relied on *Ward*'s "principal inquiry" paragraph set out above—at least in part—as an authoritative statement of the content-neutrality test. See *Turner Broadcasting Sys., Inc.* v. *FCC*, 512 U.S. 622 (1994); *Madsen* v. *Women's Health Ctr., Inc.*, 512 U.S. 753 (1994); *Hill* v. *Colorado*, 530 U.S. 703 (2000); *McCullen*, 134 S. Ct. at 2531. These cases all concerned speech that was not sexually explicit and that did not concern secondary effects. Yet each took their consideration of content discrimination—at least in part—from the *Renton/Ward* analysis. See Rienzi and Buck, 82 Fordham L. Rev. at 1216-23.

B. The Court can eliminate doctrinal drift by clearly holding that intent is not required to prove content discrimination.

Unfortunately, many lower courts, including the Ninth Circuit here, have aggressively interpreted cases like *Renton*, *Ward*, and *Hill* to mean that content discrimination is permissible so long as the government has a good reason to discriminate. See *id.* at 1225-33. Given the confusion of the lower courts on this issue, religious minorities nationwide would benefit from a clear statement by this Court that content discrimination warrants strict scrutiny, period. If a government has an allegedly good reason to discriminate, that reason should be considered in determining whether the government can pass strict scrutiny, not in determining whether the law is content discriminatory. Without such a clear rule, municipal lawyers will have the ability and an incentive to cherry-pick from among prior precedents—both this Court's and the lower courts'—in order to justify outright content discrimination.

Just as importantly, where the law is unclear, liability insurance carriers are much more likely to defend and indemnify municipalities sued for content discrimination, making it far easier for municipal officials to act with impunity. Clear violations of the Constitution or civil rights statutes generally fall within liability insurance policy exclusions; but where the law is unclear insurers are much more likely to have duties to defend and to indemnify. See, *e.g.*, *Ohio Gov't Risk Management Plan* v. *Harrison*, 874 N.E.2d 1155, 1160 (Ohio 2007) ("an insurer need not defend any action or claims within the complaint when all the claims are clearly and indisputably outside the contracted coverage").

The Ninth Circuit's decision in this case is an example of how lower courts often treat this Court's speech precedents. The Ninth Circuit did not even mention the Court's two most recent content discrimination cases—*Sorrell* and *Brown* v. *Entertainment Merchants Ass'n*, 131 S. Ct. 2729 (2011). The panel relied instead on older cases such as *Hill* and *Ward*. Pet. App. 28a-36a. Without specific guidance from this Court about how to relate each of these cases to one another, municipalities and lower courts will remain free to experiment with the boundaries of content discrimination to the severe detriment of minority religious views.

CONCLUSION

The Court should reverse the decision below. In doing so, the Court should state clearly that intentional discrimination or targeting is not an element of a content discrimination claim.

Respectfully submitted.

ERIC C. RASSBACH
Counsel of Record
MARK L. RIENZI
DIANA M. VERM
The Becket Fund for Religious Liberty
3000 K St., NW Ste. 220
Washington, DC 20007
erassbach@becketfund.org
(202) 955-0095

Counsel for Amicus Curiae

SEPTEMBER 2014

AMICUS CURIAE BRIEF

No. 13-502

Supreme Court, U.S.
FILED
SEP 2 2 2014
OFFICE OF THE CLERK

RECORD
AND
BRIEFS

In The
Supreme Court of the United States

PASTOR CLYDE REED and
GOOD NEWS COMMUNITY CHURCH,

Petitioners,

v.

TOWN OF GILBERT, ARIZONA, and
ADAM ADAMS, In His Official Capacity
As Code Compliance Manager,

Respondents.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit**

BRIEF *AMICUS CURIAE* OF THE CHRISTIAN LEGAL SOCIETY, THE ANGLICAN CHURCH IN NORTH AMERICA, ASSOCIATION OF CHRISTIAN SCHOOLS INTERNATIONAL, CHRISTIAN MEDICAL ASSOCIATION, THE ETHICS & RELIGIOUS LIBERTY COMMISSION OF THE SOUTHERN BAPTIST CONVENTION, EVANGELICAL COUNCIL FOR FINANCIAL ACCOUNTABILITY, INTERNATIONAL CONFERENCE OF EVANGELICAL CHAPLAIN ENDORSERS, THE LUTHERAN CHURCH – MISSOURI SYNOD, THE NATIONAL LEGAL FOUNDATION, AND THE QUEENS FEDERATION OF CHURCHES IN SUPPORT OF PETITIONERS

THOMAS C. BERG
UNIVERSITY OF ST. THOMAS
SCHOOL OF LAW (MINNESOTA)
RELIGIOUS LIBERTY
APPELLATE CLINIC
MSL 400, 1000 LaSalle Ave.
Minneapolis, MN 55403-2015
(651) 962-4918
tcberg@stthomas.edu

KIMBERLEE WOOD COLBY
Counsel of Record
CENTER FOR LAW AND
RELIGIOUS FREEDOM
CHRISTIAN LEGAL SOCIETY
8001 Braddock Road
Springfield, VA 22151
(703) 894-1087
kcolby@clsnet.org

Counsel for Amici Curiae

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

Library of Congress
Law Library

QUESTION PRESENTED

Does Gilbert's mere assertion of a lack of discriminatory motive render its facially content-based sign code content neutral and justify the code's differential treatment of Petitioners' religious signs?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 6

ARGUMENT 10

I. The Gilbert Sign Ordinance is Content-Based and Thus Subject to Strict Scrutiny under the Free Speech Clause of the First Amendment 10

A. The Gilbert sign ordinance discriminates among signs based on their subject matter 11

1. The ordinance facially discriminates in favor of signs promoting election-related events over signs promoting non-election-related events 16

2. The ordinance facially makes a content-based distinction – and an arbitrary and inconsistent distinction – between signs that promote political or ideological messages and signs that announce or promote events 19

3. Both the favoritism for "political" signs and the favoritism for "ideological" messages over Good News's signs are impermissibly "justified by reference to the content of the speech" 22

TABLE OF CONTENTS – Continued

Page

B. Communicating information about events is not second-class speech, but important speech critical to the distinct First Amendment protection of freedom of assembly 28

II. Even If the Gilbert Sign Ordinance is Content-Neutral, It still Violates Good News's Freedom of Speech..... 33

CONCLUSION 38

TABLE OF AUTHORITIES

Page

CASES:

Board of Educ. of Westside Community Schools v. Mergens, 496 U.S. 226 (1990) 5

Burson v. Freeman, 504 U.S. 191 (1992) 17, 18

Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753 (1995) 27

Carey v. Brown, 447 U.S. 455 (1980) 15, 16, 26

Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984).....23, 24, 37

Consolidated Edison Co. of New York v. Pub. Serv. Comm'n, 447 U.S. 530 (1980)....8, 14, 15, 16, 26

De Jonge v. Oregon, 299 U.S. 353 (1937).....28

FCC v. League of Women Voters of Cal., 468 U.S. 364 (1984).....11, 22

Good News Club v. Milford Central School, 533 U.S. 98 (2001).....15

Greer v. Spock, 424 U.S. 828 (1976).....15

Hague v. C.I.O., 307 U.S. 496 (1939) 28

Lefemine v. Wideman, 133 S.Ct. 9 (2012) 5

Lehman v. City of Shaker Heights, 418 U.S. 294 (1974).....15

Martin v. City of Struthers, 319 U.S. 141 (1943).....37

McCullen v. Coakley, 134 S. Ct. 2518 (2014).....*passim*

Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981).....16, 31, 32, 35

TABLE OF AUTHORITIES – Continued

Page

Metromedia, Inc. v. City of San Diego, 26 Cal. 3d 848, 610 P.2d 407 (Cal. 1980).....32

Mitchell v. City of New Haven, 854 F. Supp.2d 238 (D. Conn. 2012) 36

Police Dept. of City of Chicago v. Mosley, 408 U.S. 92 (1972).....8, 14, 15, 16, 26

Reed v. Town of Gilbert, 707 F.3d 1057 (9th Cir. 2013).....12, 13, 14, 22, 25

Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986).....11, 22

Saia v. People of New York, 334 U.S. 558 (1948).....26

Thomas v. Collins, 323 U.S. 516 (1945).....28, 29

Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622 (1994).....23

Ward v. Rock Against Racism, 491 U.S. 781 (1989).....24, 33, 35

Widmar v. Vincent, 454 U.S. 263 (1981) 26

CONSTITUTIONAL PROVISIONS AND STATUTES:

U.S. Const. amend. I .....*passim*

Department of Defense Instruction 1304.28 5

Equal Access Act of 1984, 20 U.S.C. §§ 4071 *et seq.* (2012).....1

TABLE OF AUTHORITIES – Continued

Page

Town of Gilbert Sign Ordinance
§ 4.402(I) 12
§ 4.402(J) 12
§ 4.402(P) 13

OTHER AUTHORITIES:

David L. Chappell, *A Stone of Hope: Prophetic Religion and the Death of Jim Crow* (2004) 32

128 Cong. Rec. 11784-85 (1982) (Sen. Hatfield Statement) 1

John D. Inazu, *Liberty's Refuge: The Forgotten Freedom of Assembly* (2012) 29

Steve Kroenig, *The Five Most Powerful Marketing Tools For Any Church*, CHURCH-WORLD DIRECT, http://www.churchworlddirect.com/articles/2011/02/07/the-5-most-powerful-marketing-tools-for-any-church 36

INTEREST OF *AMICI CURIAE*[1]

The **Christian Legal Society** ("CLS") believes that pluralism, which is essential to a free society, prospers only when the First Amendment rights of all Americans are protected, regardless of the current popularity of their beliefs, expression, and assembly. CLS is an association of Christian attorneys, law students, and law professors, with student chapters at approximately 90 public and private law schools. For nearly forty years, through its Center for Law and Religious Freedom, CLS has defended citizens' right to express their religious ideas and values in the public square, through advocacy in this Court and through legislation. For example, CLS was instrumental in the passage of the Equal Access Act of 1984, 20 U.S.C. §§ 4071 *et seq.* (2012), that protects the right of all students to meet for "religious, political, philosophical or other" speech on public secondary school campuses. *See, e.g.*, 128 Cong. Rec. 11784-85 (1982) (Sen. Hatfield statement).

The **Anglican Church in North America** ("ACNA") unites some 100,000 Anglicans in nearly 1,000 congregations across the United States and Canada into

---

[1] In accordance with Rule 37.6, no counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amici* and their counsel, make a monetary contribution to the preparation or submission of this brief. Petitioners have filed with the Clerk a letter granting blanket consent to the filing of briefs *amicus curiae*. The Respondents' email granting consent to the filing of this brief is on file with the Clerk.

a single Church. It is a Province in the Global Fellowship of Confessing Anglicans, initiated at the request of the Global Anglican Future Conference (GAFCon) in June 2008 and formally recognized by the GAFCon Primates – leaders of Anglican Churches representing 70 percent of active Anglicans globally – in April 2009. The ACNA is quickly growing to rapidly catalyze the planting of Anglican congregations and communities of faith across North America. The ACNA is determined by the help of God to hold and maintain the doctrine, discipline, and worship of Christ as the Anglican Way has received them. The ACNA is also determined to defend the inalienable human rights to the free exercise of religion and freedom of speech as given by God and embodied in the First Amendment to the United States Constitution.

The **Association of Christian Schools International** (ACSI) is a nonprofit, non-denominational, religious association providing support services to 24,000 Christian schools in over 100 countries. ACSI serves 3,000 Christian preschools, elementary, and secondary schools and 90 post-secondary institutions in the United States. Member-schools educate some 5.5 million children around the world, including 825,000 in the U.S. ACSI accredits Protestant pre-K – 12 schools, provides professional development and teacher certification, and offers member-schools high-quality curricula, student testing and a wide range of student activities. ACSI members advance the common good by providing quality education and spiritual formation to their students. Our calling relies upon

a vibrant Christian faith that embraces every aspect of life. This gives ACSI an interest in ensuring expansive religious liberty with strong protection from government attempts to restrict it.

The **Christian Medical Association** ("CMA"), founded in 1931, provides a ministry and public voice for Christian healthcare professionals and students. With a current membership of approximately 16,000, CMA addresses policies on healthcare issues, conducts overseas medical evangelism projects, provides Third World missionary doctors with continuing education resources, and sponsors student ministries in medical and dental schools. CMA members provide charitable care for needy patients domestically and overseas, regardless of the patients' beliefs. Members fully integrate their personal faith and professional practice, not separating their motivation to care for the poor and needy from their commitment to practicing according to faith-based moral standards.

The **Ethics & Religious Liberty Commission** ("ERLC") is the moral concerns and public policy entity of the Southern Baptist Convention ("SBC"), the nation's largest Protestant denomination, with over 46,000 autonomous churches and nearly 15.8 million members. The ERLC is charged by the SBC with addressing public policy affecting such issues as the sanctity of human life, freedom of speech, religious freedom, marriage and family, and ethics. In order to fulfill our divine calling to make disciples, Southern Baptists engage in nearly one thousand new church starts across the nation every year. These

new churches are dependent on their ability to effectively communicate their presence in their communities through the use of adequate, temporary signage.

The **Evangelical Council for Financial Accountability** ("ECFA") provides accreditation to leading Christ-centered churches and ministries that faithfully demonstrate compliance with established standards for financial accountability, stewardship, and governance. For thirty-five years, one of ECFA's core principles has been the preservation of religious freedom through its standards of excellence and integrity, which help alleviate the need for burdensome government oversight of religious organizations. ECFA is committed to safeguarding the First Amendment rights of free exercise of religion and freedom of speech. Nearly 1,900 churches, Christian ministries, denominations, educational institutions, and other tax-exempt 501(c)(3) organizations are currently accredited by ECFA.

The **International Conference of Evangelical Chaplain Endorsers** ("ICECE") is a conference of evangelical organizations whose main function is to endorse chaplains to the military and other organizations requiring chaplains. Endorsement is the process by which a Department of Defense ("DOD")-recognized religious organization certifies that its clergy or religious leader has the required education, training, and experience necessary to: 1) provide religious ministry to the endorsing agents' military members; 2) facilitate the free exercise of other military personnel, dependents, and other authorized

DOD personnel; and 3) care for all service personnel. *See* DOD Instruction 1304.28 (describing endorsement process and criteria). ICECE was organized specifically to identify, define, and address issues of particular importance to Christian evangelical military chaplains and the military personnel they represent. ICECE's most important issue is the protection and advancement of religious liberty for chaplains and all military personnel. The issues in this case are of particular importance to ICECE because allowing government to regulate and restrict the basic freedoms the First Amendment protects absent a showing of intent, the ruling in the courts below, essentially eviscerates religious liberty and the Bill of Rights and reverses well-established Free Speech and Establishment Clause precedent.

The **Lutheran Church – Missouri Synod** is a nonprofit corporation organized under the laws of the State of Missouri. The Synod is a mission-oriented, Bible-based, confessional Christian denomination headquartered in St. Louis, Missouri. Founded in 1847, the Synod has more than 2.3 million baptized members in some 6,200 congregations and more than 9,000 pastors. The Synod has a keen interest in protecting religious liberty generally, and in particular supporting full protection under the First Amendment.

The **National Legal Foundation** ("NLF") is a public interest law firm that has litigated a number of cases before this Court, including *Lefemine v. Wideman*, 133 S.Ct. 9 (2012) (per curiam); and *Board*

of Educ. of Westside Community Schools v. Mergens, 496 U.S. 226 (1990). The NLF is dedicated to the defense of First Amendment liberties and the restoration of the moral and religious foundation on which America was built. The NLF, and its donors and supporters, are vitally concerned with the outcome of this case because of the impact it will have on the Free Speech, Peaceable Assembly, and Free Exercise rights of churches and many other groups and individuals.

The **Queens Federation of Churches**, was organized in 1931 and is an ecumenical association of Christian churches located in the Borough of Queens, City of New York. It is governed by a Board of Directors composed of an equal number of clergy and lay members elected by the delegates of member congregations at an annual assembly meeting. Over 390 local churches representing every major Christian denomination and many independent congregations participate in the Federation's ministry. The Queens Federation of Churches has appeared as *amicus curiae* previously in a variety of actions for the purpose of defending religious liberty.

SUMMARY OF ARGUMENT

In this case, the Town of Gilbert, Arizona ("Gilbert") has abridged the First Amendment rights of the Good News Community Church ("Good News") by placing onerous restrictions on Good News's ability to display

temporary signs in public places inviting others to its Sunday morning church services and informing them of the time and location. These restrictions, found in Gilbert's ordinance regulating signs, are far more severe than restrictions on signs promoting political candidates, measures on electoral ballots, and what the town calls "ideological" messages. Accordingly, the ordinance restricts speech on the basis of its content and thus is subject to (and fails) strict constitutional scrutiny. Even if the ordinance is deemed content-neutral, it is invalid because it leaves Good News with inadequate alternatives for informing passersby about its worship services.[2]

Gilbert's sign ordinance imposes widely varying restrictions on temporary, noncommercial signs depending on the subject matter of the message they seek to convey. "Political" signs – defined as signs supporting a candidate for office or urging action on a matter on an electoral ballot – can be up to 32 square feet in size and can be in place for 60 days before an election (often even longer), and 15 days after the election. "Ideological" signs – defined as those promoting a noncommercial message or idea – can be up

---

[2] We also agree with petitioners that the ordinance fails the requirement of "narrow tailoring" – whether under strict scrutiny as a content-based law, or under intermediate scrutiny as content-neutral – because it is highly underinclusive. It imposes far more onerous restrictions on signs like petitioners' than on other temporary signs, even though the latter likewise implicate the same asserted interests in safety and aesthetics. Pet'rs' Br. 50-53.

to 20 square feet in size and can remain posted indefinitely. Signs advertising a home owners' association (HOA) event may be up to 80 square feet and can be placed 30 days before the event. But "qualifying event" signs – the category in which the town placed Good News's signs – can only be up to six square feet in size, cannot be displayed until 12 hours before the event, and must be taken down within one hour after the event.

Gilbert's sign code restricts the size and duration of signs that promote non-political events far more than it restricts signs that promote political events and political or "ideological" messages. By so doing, Gilbert discriminates among noncommercial signs based on subject matter, which is a form of content discrimination subject to strict scrutiny. *Police Dept. of City of Chicago v. Mosley*, 408 U.S. 92, 100-01 (1972). The Court of Appeals erroneously held that the ordinance was content-neutral because it was not based on "disagreement with the message conveyed" – whereas this Court has made clear that "[t]he First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic." *Consolidated Edison Co. of New York v. Pub. Serv. Comm'n*, 447 U.S. 530, 537 (1980). On its face the ordinance favors (1) signs with messages concerning political candidates and electoral ballot measures and (2) signs that the town deems "ideological" over signs that announce events. The latter distinction is arbitrary, since signs that announce

events can also include ideological messages – as the church's signs do. But in any case, these facial distinctions are plainly content-based and trigger strict scrutiny. And it is irrelevant whether the town had any improper motive, such as "disagreement with the message being conveyed": this Court's decisions make clear that a facially content-based distinction is subject to strict scrutiny regardless of the government's motive for adopting it.

Moreover, in defending the distinctions in the ordinance, both Gilbert and the Court of Appeals proposed that signs advancing electoral causes or ideological messages are more valuable than signs announcing meetings – even where, as here, the meeting is a religious worship service. The lower court's argument confirms that the ordinance's distinctions are justified by reference to the content of speech and thus are content-based.

This discrimination against speech promoting events is presumptively impermissible for another reason: it is inconsistent with the distinct constitutional right of freedom of assembly. The right "peaceably to assemble" protects the ability of Good News and other non-profit organizations to communicate their messages about their gatherings, including gatherings that are not immediately political or ideological. Assemblies of people, and the communications publicizing such meetings, have repeatedly played an indispensable role in major American social movements.

Finally, even if the Gilbert ordinance is content-neutral, it still violates Good News' First Amendment rights. Even a content-neutral restriction must be narrowly tailored to serve a significant state interest and must leave open adequate alternative channels of communication. Gilbert's ordinance fails to leave adequate alternative channels of communication because it seriously restricts temporary signs, a crucial means by which a small, little known church like Good News makes its services known to passersby. Uncontroverted testimony states that the signs are highly effective. And because Good News has limited manpower (about 25 to 30 adults in the congregation) and limited financial resources and lacks a permanent worship space, temporary signs are an affordable – and thus important – channel for Good News to publicize its worship services.

ARGUMENT

I. THE GILBERT SIGN ORDINANCE IS CONTENT-BASED AND THUS SUBJECT TO STRICT SCRUTINY UNDER THE FREE SPEECH CLAUSE OF THE FIRST AMENDMENT.

The Gilbert sign ordinance imposes widely varying restrictions on speech based on the content of the speech, and therefore under this Court's holdings, it is subject to strict scrutiny. A law is content-based if it "draw[s] content-based distinctions on its face," or relatedly, "if it require[s] 'enforcement authorities' to

'examine the content of the message that is conveyed to determine whether' a violation has occurred." *McCullen v. Coakley*, 134 S. Ct. 2518, 2531 (2014) (*quoting FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 383 (1984)). Moreover, even if a law does not refer to content on its face, it must also be "'justified without reference to the content of the regulated speech'" in order to avoid the strict scrutiny applied to content-based regulations. *Id.* (*quoting Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986)).

The Gilbert sign ordinance flunks all three parts of the *McCullen* test. First, the Gilbert sign ordinance draws content-based distinctions on its face. Second, law enforcement officers in Gilbert must look at the content of the message conveyed on a sign to determine whether a violation of the ordinance has occurred. Third, contrary to the Ninth Circuit's claim, the justifications offered for the ordinance's distinctions make reference to the content of the speech regulated: they rest on the (erroneous) judgment that Good News's speech is less valuable than the speech the ordinance favors.

A. The Gilbert Sign Ordinance Discriminates Among Signs Based on Their Subject Matter.

Three of the main sign classifications under the Gilbert sign ordinance are political signs, ideological signs, and qualifying event signs. Pet. Cert. 6-9.

- A "political sign," under § 4.402(I) of the ordinance, is a "temporary sign which supports candidates for office or urges action on any other matter on the ballot of primary, general and special elections." *Reed v. Town of Gilbert*, 707 F.3d 1057, 1061 (9th Cir. 2013); Pet. App. 7a. A political sign may be up to 32 square feet in size, may be erected 60 days before an election, and may stay up for 15 days after the election, and often longer. Pet. App. 156a.[3]

- An "ideological sign," under § 4.402(J), is defined as a "sign communicating a message or ideas for noncommercial purposes that is not a construction sign, directional sign, temporary directional sign, temporary directional sign relating to a qualified event, political sign, garage sale sign, or sign owned or required by a governmental agency." *Reed*, 707 F.3d at 1061; Pet. App. 7a. Ideological signs "are not limited in time" and can be "up to 20 square feet in size." *Id.*

- Even though petitioners' signs contain noncommercial "message[s] or ideas" – inviting readers to attend services at Good News, "Your Community Church" – the town excluded the signs from the "ideological" sign

---

[3] As petitioners note, even the 15-day limit does not apply to successful primary-election candidates, who "may display their signs for the additional ten weeks between the primary and general elections, for a total of 5 months of uninterrupted display time." Pet'rs' Br. 4 n.1.

> category because it classified them as "temporary directional signs relating to a qualifying event." *Id.* This category is defined, under § 4.402(P), as "a Temporary Sign intended to direct pedestrians, motorists, and other passersby to a 'qualifying event' "; and a "qualifying event" is considered to be "any assembly, gathering, activity, or meeting sponsored, arranged, or promoted by a religious, charitable, community service, educational, or other similar non-profit organization." Pet. App. 154a (italics omitted). Petitioners' speech was thus consigned to the most restricted category: qualifying event signs must "be no greater than 6 feet in height and 6 square feet in area" and may "only be displayed up to 12 hours before, during, and 1 hour after the qualifying event ends." *Id.* at 148a-49a.

The Court of Appeals held that these "distinctions between Temporary Directional Signs, Ideological Signs, and Political Signs are content-neutral" because "none draws distinctions based on the particular content of the sign": "It makes no difference which candidate is supported, who sponsors the event, or what ideological perspective is asserted." *Reed*, 707 F.3d at 1069; *see id.* at 1071 (finding that "Gilbert did not adopt its regulation of speech because it disagreed with the message conveyed"); *id.* at 1073 (finding that the ordinance "places no restrictions on the particular viewpoints of any person or entity").

In so holding, the Court of Appeals violated basic First Amendment principles. Most relevant here, the court reduced *content*-based discrimination to *viewpoint*-based discrimination: that is, to discrimination based on "which candidate is supported or what ideological perspective is asserted." *Id.* at 1069.[4] In fact, content discrimination also includes discriminatory restriction of speech based on its subject matter. This Court has made clear that "[t]he First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic." *Consolidated Edison Co. of New York v. Pub. Serv. Comm'n*, 447 U.S. 530, 537 (1980). Likewise, in *Police Dept. v. Mosley*, 408 U.S. 92 (1972), this Court held that a law prohibiting peaceful picketing in front of schools except schools involved in a labor dispute was a content-based speech restriction:

> The central problem with Chicago's ordinance is that it describes permissible picketing in terms of its subject matter. Peaceful picketing on the subject of a school's labor-management dispute is permitted, but all other peaceful picketing is prohibited. The operative distinction is the message on a picket sign. But, above all else, the First Amendment means that government has no

---

[4] The court's holding also violated basic First Amendment principles by reasoning that a law is not content-based unless it is motivated by disagreement with the speech in question. We discuss this error *infra* part I-A-3, pp. 22-27.

> power to restrict expression because of its message, its ideas, *its subject matter, or its content.*

Id. at 95 (emphasis added). *See also Carey v. Brown*, 447 U.S. 455, 460 (1980) (striking down law prohibiting picketing of dwelling except for "peaceful picketing of a place of employment involved in a labor dispute"). In other words, this Court held that discriminatory regulation based on subject matter is content-based and presumptively invalid.[5] The reason is that "[i]f the marketplace of ideas is to remain free and open, governments must not be allowed to choose 'which issues are worth discussing or debating.'" *Consolidated Edison*, 447 U.S. at 537-38 (*quoting Mosley*, 408

---

[5] The government may exclude speech by subject matter "in narrow circumstances": that is, it "may bar from its facilities certain speech that would disrupt the legitimate governmental purpose for which the property has been dedicated." *Consolidated Edison*, 447 U.S. at 538-39 (*citing Greer v. Spock*, 424 U.S. 828, 838 (1976) (excluding partisan political speaker from military bases); *Lehman v. City of Shaker Heights*, 418 U.S. 294, 302 (1974) (plurality opinion) (excluding partisan political advertisements from city buses)); *see also, e.g., Good News Club v. Milford Central School*, 533 U.S. 98, 106-07 (2001) (public schools may reserve their classrooms "'for the discussion of certain topics'" but "must not discriminate against speech on the basis of viewpoint") (quotation omitted). These "narrow exceptions to the general prohibition against subject-matter distinctions" (*Consolidated Edison*, 447 U.S. at 539) provide no argument for Gilbert's ordinance, which regulates speech throughout the town, including in traditional public forums (parks and right-of-ways) and on the speaker's own property. In this case the broad prohibition on content discrimination, not just viewpoint discrimination, fully applies.

U.S. at 96); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 515 (1981) (plurality opinion) (*quoting Consolidated Edison* and adding that "[w]ith respect to noncommercial speech, the city may not choose the appropriate subjects for public discourse."). *See also Carey*, 447 U.S. at 463 (*quoting Mosley*, 408 U.S. at 95-96) ("[Government] may not select which issues are worth discussing or debating in public facilities.").

1. The Ordinance Facially Discriminates In Favor of Signs Promoting Election-Related Events Over Signs Promoting Non-Election-Related Events.

As already noted, the Gilbert ordinance gives far more favorable treatment, on both the size and the permissible duration of display, to a "political" sign, defined as one that "supports candidates for office or urges action on any other matter on [an election] ballot." Pet. App. 154a. This provision unquestionably favors election-related speech over speech with other content – indeed it favors signs advertising election-related events over signs concerning events on other subjects. A sign inviting readers to attend a rally supporting a candidate for public office may be 32 feet in size and may stand for several months; a sign inviting readers to attend other events, including a church service, may only be six square feet and may only stand for 12 hours before the event and an hour afterward.

That this discrimination in the ordinance is content-based is dictated by this Court's holding in *Burson v. Freeman*, 504 U.S. 191 (1992). In *Burson*, this Court held that a Tennessee law prohibiting political speech on election day within 100 feet of a polling place was a content-based restriction because it applied only to political speech. *See id.* at 197-98; *id.* at 214 (Scalia, J, concurring in the judgment). The plurality opinion, for four justices, stated that the law "is not a facially content-neutral time, place, or manner restriction," since "[w]hether individuals may exercise their free speech rights near polling places depends entirely on whether their speech is related to a political campaign." *Id.* at 197. Justice Scalia agreed that the law was "content-based." *Id.* at 214 (Scalia, J., concurring in the judgment). The plurality also reaffirmed the principle noted above (*see supra* p. 14): "the First Amendment's hostility to content-based regulation extends not only to a restriction on a particular viewpoint, but also to a prohibition of public discussion of an entire topic." *Id.* at 197. The majority upheld the law only because of specific considerations related precisely to the problems of election-day speech at polling places. *See id.* at 206 (plurality opinion) (finding the law "necessary in order to serve the States' compelling interests in preventing voter intimidation and election fraud"); *id.* at 214 (Scalia, J.) (concluding that streets and sidewalks around polling places on election day are not public forums).

Like the Tennessee law in *Burson*, the Gilbert sign ordinance singles out speech for differential treatment solely because it is election-related. In this case, election-related signs receive favored, rather than disfavored, treatment. But the criterion is still content-based, and it is plain "on [the ordinance's] face," *McCullen*, 134 S. Ct. at 2531. Imagine a sign announcing and providing directions to a campaign rally in Gilbert in support of Senator Jeff Flake's campaign for re-election. The Gilbert ordinance characterizes this as a "political" sign, allowing it to be far larger, and stand for far longer, than a sign announcing Good News's religious services. This provision also requires an official enforcing the ordinance to "examine the content of the message" (*id.*) – indeed, perhaps quite closely. Compare, for example, two signs announcing different rallies: one supporting a pending ballot measure to reduce property taxes, the other in support of a more general non-ballot call to reduce the size of government (but which might include some discussion of the ballot measure). The second sign might well be treated significantly worse than the first on the ground that it qualifies as only an "ideological" sign, or a "qualifying event" sign, not a "political" sign. For the sign to qualify as a political sign, officials might have to examine the language closely – or perhaps even other material concerning the event – to see whether it made sufficient reference to the ballot proposal, the key criterion in determining whether the sign is "political." In any case, the provision unquestionably makes distinctions based on the content of different signs.

2. The Ordinance Facially Makes a Content-Based Distinction – and an Arbitrary and Inconsistent Distinction – Between Signs That Promote Political or Ideological Messages and Signs That Announce or Promote Events.

The Gilbert sign ordinance draws another distinction based on subject matter: between signs promoting what the ordinance calls "ideological" messages and signs promoting events. In particular, the meaning of the ordinance – as shown by its application here – seems to be that even if a sign communicates ideas, it may lose the protection given to so-called "ideological" signs if it also announces and gives directions to an event. Here, for example, the Good News signs were relegated to the minimal protections offered to event signs – even though the signs contain other messages besides the event announcement, such as the statement that Good News is "Your Community Church."

Consider three signs and their treatment under the ordinance. The first sign says "Pray, Hope, and Don't Worry." The second sign says "Church service on Sunday at 9:15 AM" and lists the Church's address, phone number, and Sunday service times. The third sign includes both messages from the first two signs. Under the Gilbert sign ordinance, as interpreted by the town, the first sign is an "ideological" sign because it communicates an idea and is not "a directional sign relating to a qualifying event."

See supra p. 12. But the second sign would be considered a "qualifying event" sign – and thus subject to far more severe restrictions – because it promotes an event (one that is not "political").

The third sign above, combining both messages, could be considered an "ideological" sign, but the inclusion of the event information – the worship times and location – apparently degrades it to a "qualifying event" sign, with far less protection. *See supra* p. 12 (quoting provision defining an ideological sign as one that is not a temporary qualifying-event sign). Thus, in this case the Good News signs were classified as "event" signs rather than the "ideological" signs, even though the signs also communicate that the church offers "[g]ood [n]ews" (by its very name) and is "Your Community Church." It is arbitrary to strip protection from the messages in a sign simply because some of those messages give information about an event such as a worship service.[6]

At any rate, these distinctions plainly depend on the content of the sign: the fact that it gives invitations and directions to an event. Moreover, an official

---

[6] The ordinance, of course, does not even make a consistent distinction between messages inviting people to events and messages with other ideas in them. The ordinance gives far greater protection to signs announcing election-related ("political") events and home owners' association events. *See* Pet'rs' Br. 11-12. The home owners' association exception adds to the arbitrariness of the town's classifications. But in any case, all of them are content-based and constitutionally suspect.

must examine the signs' messages to determine how seriously each is restricted (*see McCullen*, 134 S. Ct. at 2531). The record confirms that officers categorize a sign by "review[ing] [it] to see what the elements are, *what is the message*." Pet'rs' Br. 39 (record citation omitted).

The content-based nature of the ordinance also becomes apparent through a hypothetical variation on the facts of *McCullen v. Coakley*, *supra*. In *McCullen* this Court narrowly held that a Massachusetts law establishing a 30-foot no-speech zone in front of abortion clinics was content neutral, 134 S. Ct. at 2531-32 (although the law was ultimately held unconstitutional). The Court reasoned that "[w]hether petitioners violate the Act depends not on what they say but simply on where they say it." *Id.* at 2531 (quotation marks and citation omitted). Imagine, however, that Massachusetts enacted a buffer-zone law permitting persons who wished to present "ideological messages" to stand within 15 feet of an abortion clinic, but required persons who wished to "direct others to noncommercial events" to stand 30 feet away. Such a law would allow people communicating explicit criticism of abortion to stand close to the clinic, but it would severely restrict the sidewalk counselors in *McCullen*, if they sought simply to invite women to come to a meeting about abortion alternatives at a building down the street. It would be undeniable that such a distinction between ideological messages and meeting invitations was based on the content of speech – and undeniable that officials

would have to "examine the content of the message that is conveyed" (*id.* (*quoting League of Women Voters*, 468 U.S. at 383)) to determine where the particular speaker would be permitted to stand. Gilbert's ordinance makes the very same distinction between ideological messages and meeting announcements, and it is just as plainly content based.

3. Both the Favoritism for "Political" Signs and the Favoritism for "Ideological" Messages Over Good News's Signs are Impermissibly "Justified by Reference to the Content of the Speech."

Because the Gilbert ordinance is content-based on its face, there is no need to proceed to the last ground for finding content discrimination, that is, whether the law is "justified without reference to the content of the regulated speech" (*McCullen*, 134 S. Ct. at 2531 (*quoting Renton*, 475 U.S. at 48)). The Court of Appeals therefore erred when it deemed the ordinance content-neutral on the ground that it was not adopted "because of any disagreement with the message it conveys." *Reed*, 707 F.3d at 1072; Pet. App. 32a. As petitioners show, numerous decisions of this Court hold that a law that is content-based on its face is subject to strict scrutiny even without any showing that the government acted on the basis of an illicit motive such as animus toward, or disagreement with, the speech in question. *See* Pet'rs' Br. 34-38.

To put it differently, a challenger to a law needs to show a speech-related rationale for its enactment only when the law in question is content-neutral on its face. Identifying a content-based rationale for the law is an additional method of showing that a law is content-based, not a necessary step. *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 642 (1994) ("[W]hile a content-based purpose may be sufficient in certain circumstances to show that a regulation is content based, it is not necessary").

Decisions of this Court cited by the Court of Appeals (Pet. App. 24a) in no way support the proposition that a law must be motivated by the content of speech, or justified with reference to it, in order to be content-based. Those decisions involved laws that on their face were neutral with respect to the content of noncommercial speech. For instance, in *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984), the government prohibited demonstrators from sleeping in Lafayette Park and the National Mall based on a regulation prohibiting "the use of park land for living accommodation purposes" unless the land had been designated for camping. *Id.* at 290-91. The regulation on its face said nothing about the content of any message conveyed by illegal campers. This Court concluded that the regulation "is content-neutral *and* is not being applied because of any disagreement with the message presented." *Id.* at 295 (emphasis added). As the use of "and" shows, the Court did not reduce content-discrimination down to "disagreement with the message presented," as the

Court of Appeals did here. Likewise, *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), involved New York City guidelines requiring that concert productions in Central Park use City sound equipment and technicians who would limit the volume level. *Id.* at 786-87 & n.2. The guidelines on their face involved no reference to the content of the performance – only to its volume – and the Court noted that they were "not content based in explicit terms." *Id.* at 793. It therefore made sense for the Court to treat the guidelines as a "time, place, and manner" restriction that would be content-based if it were justified by reference to content or based on disagreement with the message conveyed. *Id.* at 791.

Unlike the camping ban in *Clark* and the sound equipment guidelines in *Ward*, the Town of Gilbert's sign ordinance is facially content-based because it treats different classes of noncommercial signs differently based on the sort of message conveyed on the sign. "Political" signs are treated differently by the ordinance than "ideological" signs and "qualifying event" signs based on the category of message the sign seeks to convey. Because the sign ordinance is facially content-based, there is no need to examine the government's rationale for enacting the law.

In any event, the asserted reasons for the distinctions between "political," "ideological," and "event" signs unquestionably do make reference to content. The town repeatedly argued in the lower courts that it could treat "political" and "ideological" speech more favorably because they were "'core speech'" under the

First Amendment and under the system of "'representative government.'" *See* Pet'rs' Br. 44-45 (*quoting* Gilbert's filings in courts below). Similarly, although the Court of Appeals asserted that the ordinance reflected no favoritism for one message over another, the court betrayed precisely such favoritism in the justifications it offered for the distinctions. It too reasoned that the "Political Signs exemption responds to the need for communication about elections" and that the "Ideological Sign exemption recognizes that an individual's right to express his or her opinion is at the core of the First Amendment." *Reed*, 707 F.3d at 1069; Pet. App. 26a. It later added:

> [U]nlike political, ideological and religious speech which are clearly entitled to First Amendment protection, there does not appear to be a constitutional right to an exemption for Temporary Directional Signs. If Good News has no constitutional right to erect Temporary Directional Signs, how can it suffer a cognizable harm when Gilbert creates an exemption facilitating the display of such signs?

Id. at 1074; Pet. App. 38a. The court thus defended the distinctions by asserting that election-related messages and ideological messages are more valuable as a constitutional matter than messages about events, because the former are "clearly entitled to First Amendment protection" and the latter are less clearly, or perhaps not at all, entitled. *See Reed,* 707 F.3d at 1080 (Watford, J., dissenting) ("Gilbert's apparent determination that 'ideological' and 'political'

speech is categorically more valuable, and therefore entitled to greater protection from regulation, than speech promoting events sponsored by non-profit organizations . is precisely the value judgment that the First and Fourteenth Amendments forbid Gilbert to make."); Pet. App. 51a. There is no other way of characterizing that distinction than as one based on the content of the messages in the respective signs.

Thus the Gilbert ordinance, as shown in the court's own defense of it, violates the core principle underlying this Court's rules concerning content-based regulation: "governments must not be allowed to choose 'which issues are worth discussing or debating.'" *Consolidated Edison*, 447 U.S. at 537-38 (*quoting Mosley*, 408 U.S. at 96); *accord Carey*, 447 U.S. at 463. Gilbert severely restricts the size and duration of petitioners' signs compared with the categories it deems more valuable for public discussion.

The distortion of public discussion in this case is particularly unwarranted for two reasons. First, it is strange indeed to deem "political" and "ideological" signs more valuable in First Amendment terms than petitioners' invitations to worship services. After all, religious speech as well is clearly "core speech" under the First Amendment. *See, e.g., Saia v. People of New York*, 334 U.S. 558, 561 (1948), and cases cited therein (protecting religious speakers on the ground that free speech and free exercise of religion are both rights "preferred" by the First Amendment); *Widmar v. Vincent*, 454 U.S. 263, 269 (1981) ("religious worship and discussion are forms of speech and

association protected by the First Amendment").[7] Moreover, petitioners' signs contain messages that are ideological in the common-sense meaning of the term – advertising the church as "Your Community Church" and as offering "[g]ood [n]ews" – yet Gilbert's ordinance removes the signs from the "ideological" category, subjecting them to much more severe restriction, because they also announce and give directions to a religious event. In this case, and in many others, it makes no sense to separate an "ideological" message from an invitation to an expressive event.

Even assuming, however, that the categories of "ideological" messages and event announcements could coherently be separated, the distinction remains content-based and subject to strict scrutiny. Moreover, as we will now show, the disfavoring of speech giving information about events is deeply inconsistent not just with freedom of speech, but with another First Amendment freedom.

---

[7] Religious messages and speakers have played such a role in the development of free-speech principles, in this Court's decisions and our tradition, broadly, that "a free-speech clause without religion would be Hamlet without the prince." *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995).

B. Communicating Information About Events is Not Second-Class Speech, but Important Speech Critical to the Distinct First Amendment Protection of Freedom of Assembly.

Another First Amendment value confirms that the ordinance's treatment of event signs is unconstitutional content discrimination. The Court of Appeals' holding that speech announcing events has little or no constitutional protection is gravely detrimental to the distinct First Amendment right of freedom of assembly. Because the people have the right not just to speak, but "peaceably to assemble," U.S. Const. amend. I, messages announcing events and directing people to them cannot be relegated to inferior constitutional status. Substantial restrictions on meeting announcements and directions can severely hamper the practical ability of groups to assemble.

This Court has made clear that the "right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental." *De Jonge v. Oregon*, 299 U.S. 353, 364 (1937). The Court has included freedom of assembly among "the great, the indispensable democratic freedoms secured by the First Amendment" and occupying a "preferred place in our [constitutional] scheme." *Thomas v. Collins*, 323 U.S. 516, 530 (1945); *see also, e.g., Hague v. C.I.O.*, 307 U.S. 496, 515-16 (1939). "[O]ur tradition allow[s] the widest room for discussion, the narrowest range for its restriction, *particularly when this right is exercised in conjunction with peaceable*

assembly." *Thomas*, 323 U.S. at 530 (emphasis added). The rights of speech and assembly, "though not identical, are inseparable." *Id.* Accordingly, the interpretation of free speech principles must give weight to the distinct but related right of assembly. As we will show, the Gilbert ordinance, by severely disfavoring signs announcing meetings and events, utterly fails to give assembly that weight.

A recent, extensive scholarly study of the right of assembly emphasizes its importance both to American history and to the proper relation between the people and the government:

> The freedom of assembly has been at the heart of some of the most important social movements in American history: antebellum abolitionism, women's suffrage in the nineteenth and twentieth centuries, the labor movement in the Progressive Era and the New Deal, and the Civil Rights Movement.
>
> [Freedom of assembly] provides a buffer between the individual and the state that facilitates a check against centralized power. It acknowledges the importance of groups to the shaping and forming of identity. And it facilitates a kind of flourishing that recognizes the good and the beautiful sometimes grow out of the unfamiliar and the mundane.

John D. Inazu, *Liberty's Refuge: The Forgotten Freedom of Assembly* 1, 5 (2012).

The history of freedom of assembly reveals several reasons why messages that announce and give directions to meetings merit equal First Amendment protection. First, announcing and directing people to meetings is as crucial to First Amendment activity as are the actual expressions of "ideological" messages that Gilbert's ordinance treats so much more favorably. To take one example, meetings were an important ingredient in the success of the women's suffrage movement. At the close of the nineteenth century, the movement re-emerged when "'hundreds of thousands'" of women joined clubs united under two main national women's organizations. Inazu, *supra*, at 44 (quotation omitted). The heart of the women's suffrage movement was in these local clubs, which grew through "local networking and personal connections," as well as gatherings such as "banner meetings, balls, swimming races, potato sack races, baby shows, meals, pageants, and teatimes," and which helped grow the movement and increase its visibility. *Id.* at 45.

Second, many of these meetings – from athletic races to baby shows to "meals, pageants, and teatimes" (*id.*) – would not be described as overtly "political" or "ideological." *See id.* at 45 (noting that with such events the movement went beyond "traditional deliberative meetings"). Nevertheless, they were important to the development of the movement, attracting new members, evoking emotions among participants, and building the "larger institutional structures" that the movement needed to operate on a national political level. *Id.* The suffrage movement and other

movements teach, in Professor Inazu's words, that "practices of assembly have themselves been forms of expression – parades, strikes, and meetings, but also more creative means of engagement like pageants, religious worship, and the sharing of meals." *Id.* at 21. "Indeed, almost every important social movement in our nation's history began not as an organized political party but as an informal group that formed as much around ordinary social activity as extraordinary political activity." *Id.* at 5.[8]

Accordingly, when Good News notifies people about worship events and provides directions to them, it is engaged in important First Amendment activity: speech that is also crucial to the distinct but interwoven right of assembly.

Finally, signs notifying people of events constitute a crucial component of the activities of speech and assembly. As this Court has noted, outdoor signs "are a well-established medium of communication, used to convey a broad range of different kinds of messages." *Metromedia*, 453 U.S. at 501 (plurality opinion); *see id.* ("The outdoor sign is a venerable

---

[8] For reasons Professor Inazu explores in detail, the right "peaceably to assemble" is not limited to the purpose of "petition[ing] the government for a redress of grievances." *See* Inazu, *supra*, at 23, 25 (noting that the comma in the phrasing "peaceably to assemble, and to petition" "relates back to a distinction [in drafts] between a right to peaceable assembly and a right to petition," and that the broader, independent notion of assembly "is consistently displayed in practices of the people who have gathered throughout American history").

medium for expressing political, social and commercial ideas. From the poster or "broadside" to the billboard, outdoor signs have played a prominent role throughout American history, rallying support for political and social causes.") (*quoting Metromedia, Inc. v. City of San Diego*, 26 Cal. 3d 848, 888, 610 P.2d 407, 430-31 (Cal. 1980) (Clark, J., dissenting)). Without signs, it is hard to imagine the women's suffrage movement, labor movement, and civil rights movement succeeding to the extent they did. Imagine the women's suffrage movement without the availability of meeting signs: no signs marking the locations of special events or women's suffrage club meetings, no signs advertising about the new club to women.

Signs would have been important to the growth of other major movements as well. In the labor movement, basic signs would have played a prominent role in communicating to workers about meetings and signup drives and the dates and times of strikes. Finally, the civil rights movement also depended in part upon signs informing people of the times and locations of meetings and rallies – many of which, of course, took the form of religious, indeed revivalistic, worship services. *See* David L. Chappell, *A Stone of Hope: Prophetic Religion and the Death of Jim Crow* 102 (2004) ("It is hard to imagine such faith [in mass protests against segregationist oppression] being sustained without emotional mass rituals – without something extreme and extraordinary to link the masses' spirits. It is impossible to ignore how

often the participants carried their movement out in prophetic, ecstatic biblical tones.").

Just as communications giving notice of meetings historically have been important to the success of several great social movements, they remain so today. The Court of Appeals fundamentally erred by dismissing this as low-value First Amendment activity.

II. EVEN IF THE GILBERT SIGN ORDINANCE IS CONTENT-NEUTRAL, IT STILL VIOLATES GOOD NEWS'S FREEDOM OF SPEECH.

Even if a law is found to be content-neutral, that of course does not dispose of all First Amendment challenges. Such a law still "must be 'narrowly tailored to serve a significant governmental interest.'" *McCullen*, 134 S. Ct. at 2534 (*quoting Ward v. Rock Against Racism*, 491 U.S. at 796). And it must "leave open ample alternative channels of communication." *Ward*, 491 U.S. at 802. Even assuming *arguendo* that the Gilbert sign ordinance is content-neutral, it is still unconstitutional because – among other things – it does not leave adequate alternative channels open for Good News and other similarly situated nonprofit organizations. The severe restrictions on "directional event" signs leave a small church like Good News, limited in its resources, with inadequate alternatives to publicize its church services to potential congregants passing through the neighborhood.

This Court just recently made clear, in *McCullen v. Coakley*, *supra*, that even content-neutrality analysis significantly limits the state in restricting speech. The Court held that the Massachusetts buffer zone law significantly burdened the pro-life sidewalk counselors in their attempts to reach out to the people walking into abortion clinics. 134 S. Ct. at 2535-36. In assessing the degree of burden, the Court took a practical approach based on the particular situation of the speakers and the message they wished to convey. The Court therefore found it "no answer" to say that the pro-life counselors could "engag[e] in various forms of 'protest' outside the buffer zones." *Id.* at 2536-37. Eleanor McCullen testified that she was unable to tell passersby from persons heading to the abortion clinic "in time to initiate a conversation before they enter the buffer zone." *Id.* at 2535. Moreover, McCullen said she abruptly had to end conversations she managed to start with persons heading to the clinic when they got to the buffer zone, which made her "appear 'untrustworthy'." *Id.* Thus, McCullen was "often reduced to raising her voice at patients from outside the zone," a method "sharply at odds with the compassionate message she wishes to convey" as a sidewalk counselor seeking to bring love, hope and healing to women contemplating abortion. *Id.* As noted above, the Court recognized the commonsense point that "[i]f all that the women can see and hear are vociferous opponents of abortion, then the buffer zones have effectively stifled petitioners' message." *Id.* at 2537.

By contrast, in *Ward v. Rock Against Racism*, the Court held that rock concert organizers burdened by New York City's sound regulations had ample alternative channels of communication left open; the regulations "continue[d] to permit expressive activity in the bandshell and ha[d] no effect on the quantity or content of that expression beyond regulating the extent of amplification." *Ward*, 491 U.S. at 802.

Like the sidewalk counselors in *McCullen* and unlike the rock concert organizers in *Ward*, Good News has been severely restricted in its use of an important channel of communications to attract new congregants to its church services. Gilbert has applied its ordinance to forbid Good News from displaying its signs concerning church services until 12 hours before the services begin. For Sunday morning services, therefore, the signs cannot be displayed until the nighttime beforehand. As a matter of common sense, this seriously decreases their capacity to reach passersby, whether motorists or pedestrians, who might be attracted to the services.

Signs are also crucial to Good News's ability to invite others to its services. As discussed above, this Court has recognized signs as a "venerable medium" for "convey[ing] a broad range of different kinds of messages." *Metromedia*, 453 U.S. at 501 (quotation omitted); *see supra* p. 31. But temporary signs are particularly crucial for a congregation like Good News. As petitioners explain, "The Church has a small congregation, averaging between 25-30 adults

and 4-10 children per week, and very limited financial means. Due to the Church's temporary facilities, restricted finances, and limited manpower, posting signs is an essential means by which Petitioners make others aware of their Church services." Pet. Cert. 12-13 (record citations omitted). Lacking real estate of its own, and renting worship space in a public school building, Good News obviously cannot erect a permanent sign; it must depend on the temporary directional signs that Gilbert singles out for regulation. In uncontroverted testimony, the church's pastor, Clyde Reed, stated that the signs had been "'very, very effective' based on his 'experience over ten years' using them in Gilbert." Pet'rs' Br. 8 (record citations omitted).

Good News's reliance on such signs is by no means unusual for a church with limited finances and manpower. As one consultant to churches emphasizes, a group of signs "can reach more people for a lot less money. It's less expensive and more effective than ongoing space ads in newspapers and magazine or radio and TV ads." Steve Kroenig, *The Five Most Powerful Marketing Tools For Any Church*, CHURCHWORLD DIRECT, http://www.churchworlddirect.com/articles/2011/02/07/the-5-most-powerful-marketing-tools-for-any-church (last visited September 11, 2014).

Likewise, online methods of communication have limited value for a little known church like Good News. In *Mitchell v. City of New Haven*, 854 F. Supp.2d 238 (D. Conn. 2012), the city argued that Facebook, Twitter, and the Occupy New Haven

website constituted adequate alternative channels of communication for the Occupy New Haven movement to communicate its message to the citizens of New Haven. The court acknowledged that these channels were available but expressed "doubt that [they] alone would be sufficient under *Clark*" – primarily because, as the court put it, they are "forms of communication that are only seen when someone seeks them out." *Id.* at 253. As a tiny, little known church, Good News must get people to recognize its name in the first place before they will go online and seek out its messages about its meetings or its beliefs.

For small congregations, the restrictions on the less expensive and more effective medium of signs do not simply cause inefficiencies or raise costs; they may seriously hamper First Amendment activity. In *Martin v. City of Struthers*, 319 U.S. 141 (1943), this Court struck down a ban on door-to-door distribution of literature. Even though the law only restricted that method of expression, the Court noted that leafleting "is one of the most accepted techniques of seeking popular support" and added – in a famous phrase – that the technique "is essential to the poorly financed causes of little people." *Id.* at 146. Similarly, placing lawn signs in 2014 "is one of the most accepted techniques of seeking popular support" and is "essential to the poorly financed causes" of many small organizations, especially congregations like Good News.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

THOMAS C. BERG
UNIVERSITY OF ST. THOMAS
SCHOOL OF LAW (MINNESOTA)
RELIGIOUS LIBERTY
APPELLATE CLINIC
MSL 400, 1000 LaSalle Ave.
Minneapolis, MN 55403-2015
(651) 962-4918
tcberg@stthomas.edu

KIMBERLEE WOOD COLBY
Counsel of Record
CENTER FOR LAW AND
RELIGIOUS FREEDOM
CHRISTIAN LEGAL SOCIETY
8001 Braddock Road
Springfield, VA 22151
(703) 894-1087
kcolby@clsnet.org

Counsel for Amici Curiae

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
SEP 22 2014
OFFICE OF THE CLERK

No. 13-502

In the Supreme Court of the United States

PASTOR CLYDE REED AND GOOD NEWS COMMUNITY CHURCH,

Petitioners,

v.

TOWN OF GILBERT, ARIZONA, AND ADAM ADAMS, IN HIS OFFICIAL CAPACITY AS CODE COMPLIANCE MANAGER,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE CHRISTIAN LIFE COMMISSION OF THE MISSOURI BAPTIST CONVENTION SUPPORTING PETITIONERS

MICHAEL K. WHITEHEAD
WHITEHEAD LAW FIRM, LLC
1100 Main Street
Suite 2600
Kansas City, MO 64105
(816) 876-2600
mike@thewhiteheadfirm.com

JONATHAN R. WHITEHEAD
Counsel of Record
229 SE Douglas Street
Suite 210
Lee's Summit, MO 64063
(816) 398-8305
jon@whiteheadlawllc.com

Counsel for Amicus Curiae

Becker Gallagher Cincinnati, OH Washington, D.C. 800.890.5001

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iv

INTEREST OF AMICUS CURIAE 1

SUMMARY OF THE ARGUMENT 3

ARGUMENT 5

I. The Ninth Circuit's Test for Content Neutrality conflicts with this Court's Free Speech precedents. 6

II. The Ninth Circuit's Test endangers Free Exercise rights by permitting discriminatory burdens to be imposed on "religious / non-profit event" signs. 9

A. Gilbert's Code Words discriminate against religious assemblies. 10

1. Code Words were not generally applicable initially. 10

2. Initial Code Words show bad intentions to target religious assemblies. 12

3. Current Code Words disfavor some religious worship events in practice. 13

4. Worship Gathering is core to Christian faith, just as animal sacrifice was core to Likumi Church. 14

5. Baptists gather for worship on the Lord's Day. 16

6. Baptists must invite "whosoever will" to gather for worship. 17

7. Alternative methods of communication cannot justify or excuse content-based discrimination. 18

B. Gilbert's Sign Code raises Establishment Clause concerns as it appears to favor larger religious groups. 19

1. Congressional hearings found discrimination is well-disguised. 19

2. Southern Baptist small churches need signs for ministry. 20

3. Town may have had bad intentions to disfavor small churches. 21

III. The Ninth Circuit's Test for Content Neutrality endangers Assembly Clause rights by protecting discrimination against certain meetings. 23

CONCLUSION 24

APPENDIX

Appendix A BAPTIST FAITH AND MESSAGE (2000) App. 1

Appendix B RESOLUTIONS BY THE SOUTHERN BAPTIST CONVENTION App. 4

TABLE OF AUTHORITIES

Cases

Arkansas Writer's Project, Inc. v. Ragland,
481 U.S. 221 (1987) 7

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,
508 U.S. 520, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993) *passim*

City of Cincinnati v. Discovery Network,
507 U.S. 410 (1993) 7

Employment Div. Dep't of Human Res. of Or. v. Smith,
494 U.S. 872, 110 S. Ct. 1595, 108 L.Ed.2d 876 (1990) 9, 12, 13

McDaniel v. Paty,
435 U.S. 618 (1977) 8

Reed v. Town of Gilbert, Az.,
587 F.3d 966 (2009) *passim*

Reed v. Town of Gilbert, Az.,
707 F.3d 1057 (9th Cir. 2013) *passim*

Walz v. Tax Comm'n of the City of New York,
397 U.S. 664, 90 S. Ct. 1409 (1970) 11

Widmar v. Vincent,
454 U.S. 263 102 S. Ct. 269 (1981) 18

Constitution and Statutes

U.S. Const. amend. I *passim*

42 U.S.C. § 2000cc *et seq*. 19

Gilbert Land Development Code, Division 4, General Regulations, Article 4.4 *passim*

Other Authorities

Baptist Faith and Message, 2000
Article VIII, The Lord's Day 2, 3, 16

Article XI, Evangelism and Missions 3, 17

Article XVII, Religious Liberty 3

146 CONG. REC. S7774-5 (daily ed. July 27, 2000) 20

Rep. of the House Committee on the Judiciary, H.R. REP. NO. 106-219 20

Douglas Laycock, *State RFRAs and Land Use Regulation*, 32 U.C. DAVIS L. REV. 755 (1999) 20

New Testament
Hebrews 8:1-10:18 15
Hebrews 10:19-10:25 16
Hebrews 10:10 17
Luke 2:10 21
Luke 14:23 17

SBC RESOLUTION: On A Call For Church Revitalization, Baltimore, MD - 2014 2

SBC RESOLUTION: On Violations of Religious Freedom and Assembly in the United States, Houston, TX - 2013 3

INTEREST OF AMICUS CURIAE[1]

Amicus curiae Missouri Baptist Convention Christian Life Commission ("CLC") is the public policy entity of the Missouri Baptist Convention ("MBC").

MBC is one of forty-two state Baptist conventions affiliated with the Southern Baptist Convention ("SBC"). The SBC is the nation's largest Protestant denomination, with about 16 million members in over 46,000 autonomous local churches and church-type missions. The MBC is comprised of nearly 2000 local churches with about a half million members.

The MBC Christian Life Commission exists to help churches apply Christian principles to moral and public policy issues; and to communicate with lawmakers and courts about religious liberty and other policy issues in cooperation with the churches and other MBC and SBC entities. Don Hinkle, Director of Public Policy for the MBC, is the liaison with the CLC, with offices in Jefferson City, MO.

Dr. John Yeats is the Executive Director of the Missouri Baptist Convention. For over 17 years, he has been one of five elected officers of the Southern Baptist Convention and serves on its Executive Committee, with offices in Nashville, TN.

---

[1] No counsel of a party authored this brief in whole or in part; nor did any person or entity, other than amicus or its counsel, make a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief under Sup. Ct. R. 37.3. Petitioners have filed a blanket consent letter with the Clerk, July 9, 2014. Respondents have consented by letter to this Amicus, September 21, 2014.

Southern Baptists in Missouri and elsewhere care about starting new churches, sometimes called "church planting." The MBC is cooperating with most other state conventions and the SBC North American Mission Board (NAMB) in a major new initiative called "Send North America," which has prioritized the planting of new evangelistic churches, especially in the unreached and underserved areas outside the South. NAMB and its partners are investing in church plants in 50 large cities, including the Phoenix area, where Petitioners are located.

An SBC Resolution adopted by thousands of SBC messengers meeting in Baltimore in June, 2014, affirmed NAMB's renewed focus on church planting and "re-planting" in North America.[2]

Southern Baptists in Missouri and elsewhere care about religious liberty for all people. A section in the SBC statement of faith says: "God alone is Lord of the conscience....Church and state should be separate....A free church in a free state is the Christian ideal....In providing for such freedom no ecclesiastical group or denomination should be favored by the state more than others."[3]

Baptists believe that God grants Religious Freedom as a fundamental human right, which government

---

[2] SBC Resolution, 2014, On a Call for Church Revitalization, at Appendix B.

[3] Baptist Faith and Message (BFM), 2000, Article XVII, at Appendix A.

should recognize, as in our First Amendment.[4] Local sign ordinances that discriminate against churches, or favor some churches over others, violate the First Amendment. Southern Baptists are deeply interested in and will be affected by the outcome of this case.

Each local church, state convention and national entity is independent and autonomous. No one entity speaks for all Southern Baptists, but your *Amicus* is positioned to apprise this Court of concerns of Southern Baptists in Missouri and elsewhere, regarding official motions and resolutions adopted at SBC and MBC annual meetings[5] Leaders like those named above attend the SBC annual meetings as messengers from local churches, and participate in the actions adopted by the convention, and referred to herein.

Your *Amicus* submits this brief in support of Petitioners, and urges this Court to reverse the Ninth Circuit Court of Appeals.

SUMMARY OF THE ARGUMENT

Bad laws cannot be saved by good intentions.

The Town of Gilbert's Sign Code makes confusing classifications based on the content of speech on the signs. Political and ideological signs receive more

---

[4] SBC Resolution, 2013, On Violations of Religious Freedom and Assembly in the United States, at Appendix B.

[5] *See* Appendix A, Baptist Faith and Message, 2000, Articles VIII, XI and XVII; and Appendix B, SBC Resolutions, for the biblical basis and policy statements which, in part, guide MBC CLC communications to lawmakers and courts about the relevant public policies in this case.

favorable treatment than religious meeting signs.[6] An amended Code cosmetically reclassified religious assemblies as as mere "Qualifying event[s] by non-profits,"[7] and then proceeded to impose greater restrictions on them for sign display.

Qualifying event signs—such as church meeting signs-- are more limited in size, time of display, and number, even compared to other, noncommercial signs.[8] The Ninth Circuit would allow the disparate treatment, saying such religious meeting/non-profit event signs are not "core [free] speech."[9] Further, since the court believed that such restrictions were not motivated by hostility or viewpoint bias, the sign code was deemed content-neutral.

Under this Court's clear doctrine, the First Amendment requires government sign regulations to be objectively, facially content neutral, or else face strict scrutiny, regardless of good intentions by lawmakers. Bad laws cannot be saved by good intentions. And bad laws cannot be made better by increasing the number of persons being treated badly.

The Court below rests its analysis on the First Amendment's Free Speech Clause, especially cases

---

[6] *Reed v. Town of Gilbert, Az.*, 707 F.3d 1057, 1076 (2013). Hereafter, "*Reed II*", to distinguish from the Ninth Circuit's prior decision at 587 F.3d 966 (9th Cir. 2009 ("*Reed I*").

[7] *Id.*

[8] *Id.*

[9] *Id.* at 1069.

concerning speech and commerce. Other First Amendment concerns are also implicated by a distorted definition of content neutrality. The objective test for content neutrality urged by Petitioners will have the added advantage of safeguarding the other First Amendment freedoms in the Free Exercise, Establishment and Assembly Clauses of concern to your Amicus.

ARGUMENT

People communicating important messages often use signs. People directing others to important meetings often use signs. People regulating what they consider "sign clutter" are often tempted to regulate sign content as well.

The Town of Gilbert, AZ, has failed to resist this temptation. The 9th Circuit, in its first opinion below, said: "In an effort to promote a safe, harmonious and pleasant environment—and presumably to insulate itself from challenges under the First Amendment—Gilbert has adopted a sign ordinance that makes one's head spin to figure out the bounds of its restrictions and exemptions."[10]

Your Amicus, on behalf of many Southern Baptists, is tempted to shout: "Amen."

Yet, in spite of this criticism of the confusing code, the Ninth Circuit panel majority makes other heads spin by declaring this content-based law to be content-neutral.

---

[10] *Reed v. Town of Gilbert, Az.*, 587 F.3d 966 (9th Cir. 2009 ("*Reed I*").

I. The Ninth Circuit's Test for Content Neutrality conflicts with this Court's Free Speech precedents.

The Town of Gilbert's sign code expressly discriminates based on the content of signs, with three categories of speech:

1. "temporary sign[s] which support[] candidates for office or urge[s] action on any other matter on the ballot," which can be up to 32 square feet in size,

2. "sign[s] communicating a message or ideas for noncommercial purposes" that are not related to a "qualifying event," which can be up to 20 square feet in size, and

3. noncommercial signs that do relate to a "qualifying event" by a non-profit, which can only be up to 6 square feet in size.[11]

On its face, the Code is content-based, as this Court's precedents have defined the concept, as Petitioners' Brief well documents. See Pet. Op. Br. 22-43.[12]

Straining to save a bad law, the panel majority points to the Town's good intentions. Surely the Town did not intend to discriminate against certain ideas, so the law must be content-neutral. Surely the Town did

---

[11] Gilbert Land Development Code, Division 4, Article 4.4.

[12] Your Amicus fully endorses the legal arguments lodged by Petitioners in their briefs before this Court. We do not repeat them here, but focus on issues and arguments that specially concern Southern Baptists in Missouri and elsewhere.

not favor one viewpoint over another about religious / non-profit events, so the law must be viewpoint neutral. By incorporating good intentions into the test for content neutrality, the Ninth Circuit departs dangerously from this Court's precedents regarding Free Speech.

The Ninth Circuit panel majority has embraced a new definition of content neutrality which has split eight circuit courts of appeals in the ways set out in Petitioners' Pet. for Cert. 18.

This Court's doctrine, however, holds that content-based laws are presumptively unconstitutional, regardless of good intentions or viewpoint neutrality. Bad laws cannot be saved by good intentions.

In *City of Cincinnati v. Discovery Network*, 507 U.S. 410 (1993), this Court struck down speech restrictions that discriminated based on the content of publications. The government asserted its good intentions related to safety and aesthetics. *Id.* at 412-14. The Court noted there was no evidence that the city acted with any bad motive toward particular ideas in the newspapers, but nonetheless rejected the view that "discriminatory treatment is suspect under the First Amendment only when the legislature intends to suppress certain ideas." *Id.* See also *Arkansas Writer's Project, Inc. v. Ragland,* 481 U.S. 221 (1987), striking down a content-based sales tax exemption for "religious" and other journals, in spite of the lack of any evidence of bad intentions by state lawmakers. *Id.* at 228.

Justice Brennan noted in *McDaniel v. Paty*, 435 U.S. 618, 629 (1977), that the First Amendment does not "place religious discussion, association, or political participation in a status less preferred than rights of discussion, association, and political participation generally.... Of course, churches as much as secular bodies and private citizens have that right."[13] *McDaniel*, of course, dealt with an attempt to separate religious occupations from political occupations, a folly similar to separating religious and political signage.

For all the reasons argued by the Petitioners in their Opening Brief, this Court should reverse the decision by the panel majority of the Ninth Circuit Court of Appeals.

But there are other concerns raised by this case which are also important to your Amicus. Without diverting attention from the threshold Free Speech issues above, your Amicus wishes to invite the Court's attention to additional First Amendment concerns which would also be remedied by reversal of the Ninth Circuit decision. The objective test urged by Petitioners would also safeguard the other First Amendment freedoms of the Free Exercise, Establishment, and Assembly Clauses, as discussed below.

---

[13] Emphasis added.

II. The Ninth Circuit's Test endangers Free Exercise rights by permitting discriminatory burdens to be imposed on "religious / non-profit event" signs.

In the two opinions below, the Ninth Circuit gave short shrift to Petitioners' arguments under the First Amendment's Religion Clauses. The lower court noted a Free Exercise claim (and connected it to the Arizona Free Exercise of Religion Act),[14] but the lower court quickly concluded that Section 4.402(P) is "generally applicable," and does not constitute a substantial burden on religious practice, *id.*, citing *Employment Div. Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 878-79, 110 S. Ct. 1595, 108 L.Ed.2d 876 (1990).

The lower Court failed to look at the ordinance at the correct levels of generality. Taking a step back, comparing Section 4.402(P) to sections of the same ordinance, one finds the Code raises Free Exercise concerns by burdening religious practice with more restrictions than are imposed on signs about "ideology" or "politics."

Taking another step back, Gilbert's entire Temporary Sign scheme raises Establishment Clause concerns about favoring certain kinds of religious groups over others. The Ninth Circuit erred when it concluded Gilbert met its burden to show the scheme was permissible under the Free Exercise and Establishment Clauses.

---

[14] *Reed II*, 707 F.3d at 1076.

A. Gilbert's Code Words discriminate against religious assemblies.

The Ninth Circuit decided that the Town of Gilbert's Code posed no Free Exercise concerns on two grounds: first, it decided the language was generally applicable.[15] Second, it held that "Good News's members may be obligated to spread their message and advertise their events, but there is no suggestion that Good News's tenets require that they do so in any particular way."[16] This analysis was faulty in both premises.

1. Code Words were not generally applicable initially.

First, the legislative history shows that the Code was not a generally applicable law. The Code was originally intended to apply *only* to religious assemblies. The Code words were "Religious Assembly Temporary Directional Signs."[17] After Petitioners complained about the obvious intentional discrimination against religious groups, the Town changed the Code words in Section 4.402(P) to "noncommercial events" by religious and other non-profit organizations.[18] There is no evidence the intention changed.

---

[15] *Reed II*, 707 F.3d at 1076

[16] *Id.*

[17] *Reed I*, 587 F.3d at 966 n.3.

[18] *See id.*

Under the guidance of *Walz v. Tax Comm'n of the City of New York*[19] and *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*[20], it is insufficient to say that some other groups have now been included in a law which has formerly targeted religious worship practices. When considering laws like Gilbert's ordinance, "the Free Exercise Clause protects against governmental hostility which is masked, as well as overt. The Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders." *Walz*, *supra*.

Like the ordinances targeting the Church of the Lukumi Babalu Aye,[21] Gilbert's Section 4.402(P) was admittedly created to target a particular religious practice.[22] Gilbert changed the Code words to include more noncommercial signs than just church signs, but church signs were still included. Unlike the tax law approved in *Walz*, Section 4.402(P) is not a broad, catch-all definition of noncommercial speech.[23]

---

[19] *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 696, 90 S. Ct. 1409, 1425 (1970).

[20] *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534, 113 S. Ct. 2217, 2227 (1993).

[21] *Id.*

[22] *Reed I*, 587 F.3d at 966 n.3.

[23] *See Walz*, 397 U. S. at 697 ("the statute, by its terms, grants this exemption in furtherance of moral and intellectual diversity, and would appear not to omit any organization that could be reasonably thought to contribute to that goal.")

Further, *Lukumi* said that Free Exercise principles of general applicability are informed by equal protection cases.[24] "[T]he specific series of events leading to the enactment or official policy in question" is "relevant evidence" to Free Exercise claims.[25] Yet the Ninth Circuit waved away Good News's hybrid Free Exercise / Equal Protection claim, calling it "basically a revision of its argument that Gilbert cannot treat different types of noncommercial speech differently...."[26]

2. Initial Code Words show bad intentions to target religious assemblies.

On the face of this record, a key Free Exercise / Equal Protection issue is that Gilbert's initial targeting of religious services should deprive the ordinance of "rational basis" approval on summary judgment – even if the Town had later included some additional forms of non-commercial speech in Sec. 4.402(P). Gilbert's ordinance cannot become generally applicable at Gilbert's mere inclusion of more victims, even under the most lax reading of *Smith*.

Hence, the maxim: **Bad laws cannot be saved by good intentions.** And the corrolary: **Bad laws are not made better by increasing the number of people who are treated badly**.

---

[24] *Lukumi*, 508 U.S. at 540, 113 S. Ct. at 2231 (1993).

[25] *Id.*

[26] *Reed II*, 707 F.3d at 1076-77.

3. Current Code Words disfavor some religious worship events in practice.

Gilbert's Qualifying Event Directional Signs are distinguished in the Code from "ideological" signs, merely by saying that ideological signs are those not tied to an event. Under Gilbert's scheme, "ideological" signs are less restricted in time and number.[27] However, the history of the case is that even signs without event time information were treated by Gilbert as event signs that fell under Section 4.402(P).[28]

Apart from whether the new Code words can be called "generally applicable," the Ninth Circuit's Free Exercise analysis fails to grapple with the fact that the Code, in effect, "disfavor[s] [Petitioners'] religion because of the religious ceremonies it commands...."[29] Where a scheme burdens a religious ceremony compared to other "ideological" activity, even *Smith* calls for further analysis of the government's interests and tailoring.[30]

---

[27] *Reed II*, 707 F.3d at 1076-77.

[28] *Reed I*, 587 F.3d at 972 ("...a Code Compliance officer ... stat[ed] that signs were displayed outside of the hours allowed and did not include a date for the religious service. ... the Code Compliance Manager told Good News that there is no leniency under the Code...." [internal quotations omitted]).

[29] *Lukumi*, 508 U.S. at 532, 113 S. Ct. at 2226 (1993).

[30] *Employment Div. Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 878-79, 110 S. Ct. 1595, 108 L.Ed.2d 876 (1990).

The lower court tacitly questioned whether Good News's interest in directing the public to a Sunday service through signs is really all that important to its religion. "Good News's members may be obligated to spread their message and advertise their events, [but] there is no suggestion that Good News's tenets require that they do so in any particular way."[31]

Elsewhere, the lower court describes election speech on signs as "core" protected activity and individual "ideological" speech as core protected activity.[32] In other words, the court assumes that Good News's act of directing the public to a religious meeting is not, at root, a religious expression, ideological speech, or a political act. Telling the public to "worship with us at the Senior Center on Sundays at 9 a.m." is not, in this view, core First Amendment activity in the way that "Vote for Smith" is core political activity, or "Imagine there's no Heaven" is core ideological speech. The act of directing the public is viewed as mere advertising or publicity of an event, not the core of religious worship.

4. Worship Gathering is core to Christian faith, just as animal sacrifice was core to Likumi Church.

The leading precedent concerning ordinances that restrict religious ceremony is, of course, the animal sacrifice ceremony of the *Church of Lukumi Babalu*

---

[31] *Reed II*, 707 F.3d at 1076.

[32] *Id.*

Aye.[33] There, "neutral" language masked an ordinance that effectively stopped religious ceremonies of a particular group.

This Court recognized that, in operation, the ordinances "...disfavor [Petitioners'] religion because of the religious ceremonies it commands...."[34] The same pattern is present in Gilbert's ordinances. Here, Gilbert's exceptions allow ideological advertising about a group or position, so long as the advertising is not about a meeting or assembly. The Ninth Circuit blithely concludes that Good News's directions to the worship assembly are nothing so core to its First Amendment religious expression as are the animal sacrifice ceremonies of Santeria.[35]

The Ninth Circuit misunderstands the role of public worship assemblies in the Christian faith. In a country where animal sacrifice is rare and strange, Sunday worship may seem too routine and normal to be central to the faith. But those services were an anomaly to an ancient world where animal sacrifice was the norm.

In fact, the writer of the New Testament book of Hebrews explicitly ties together sacrifice and worship services. Hebrews 8:1-10:18 is an extended discourse on the Christian gospel, the "good news" that Jesus Christ is a sacrifice for sin. It concludes in chapter 10, verse 18: "where [sins] have been forgiven, sacrifice for sin is no longer necessary."

---

[33] *Lukumi*, 508 U.S. at 532, 113 S. Ct. at 2226.

[34] *Id.*

[35] *Reed II*, 707 F.3d at 1076.

Starting in verse 19 of chapter 10, the writer suggests this gospel results in three responses by Christians: drawing near to God (v. 22), holding "unswervingly" to hope (v. 23), and corporate meetings to celebrate the good news: "let us consider how we may spur one another on toward love and good deeds, *not giving up meeting together, as some are in the habit of doing*, but encouraging one another..." (vv. 24-25) (emph. added).

The observance of services by Christians, then, is not just a "Qualifying Event" and not just a lecture. The acts of meeting and inviting are acts of religious worship.

5. Baptists gather for worship on the Lord's Day.

Baptists, in particular, place great emphasis on this regular, corporate worship. The Southern Baptist Convention's Statement of Faith, the "Baptist Faith and Message," states in Article VIII, concerning the Lord's Day: "The first day of the week is the Lord's Day. It is a Christian institution for regular observance. It commemorates the resurrection of Christ from the dead and should include exercises of worship and spiritual devotion, both public and private. Activities on the Lord's Day should be commensurate with the Christian's conscience under the Lordship of Jesus Christ." *See* App. A.

If some religions point to repeated, ongoing sacrifices as necessary for worship, such as Santeria, the Christian counterpoint is a regular weekly gathering to reflect on the sacrifice-to-end-all-

sacrifices.[36] The act of Christian corporate worship was (and is) a radical religious, political, and ideological expressive activity. Gilbert's restriction on invitation signs for worship services unequally burdens Good News's ability to freely exercise its religious faith, and thus is improper under the Free Exercise Clause.

6. Baptists must invite "whosoever will" to gather for worship.

Baptists, likewise, emphasize the duty to invite others to come hear the preaching of the Gospel. Baptist Faith and Message, Article XI, Evangelism and Missions, states: [i]t is the duty ... of every church of the Lord Jesus Christ to endeavor to make disciples of all nations.... It is the duty of every child of God to seek constantly to win the lost to Christ by verbal witness undergirded by a Christian lifestyle, and by other methods in harmony with the gospel of Christ." *See* App. A.

Inviting "whosoever will" is not just advertising to join a club. It is a sacred duty, and an act of love, to use any and all means to invite others to come worship God through His Son, Jesus Christ.[37]

---

[36] See Hebrews 10:10 ("By this will, we have been sanctified through the offering of the body of Jesus Christ once and for all.")

[37] *See* Luke 14:23 ("And the lord said to the servant, 'Go out into the highways and the hedges and compel them to come in, that my house may be filled.")

7. Alternative methods of communication cannot justify or excuse content-based discrimination.

The Ninth Circuit held that the Gilbert Sign Code was a content-neutral time, place and manner restriction on speech, and thus needed only to be narrowly tailored to advance a significant government interest while leaving ample alternate channels of communication.[38] This argument is reminiscent of the sole dissent in *Widmar v. Vincent*, 454 U.S. 263 (1981), which would have upheld a campus ban on a religious group's worship meetings because there were alternative meeting places off-campus "about a block and a half" away.[39] Eight justices rejected the dissenting view, and found that the campus ban on religious worship was content-based, requiring strict scrutiny, and making unnecessary a review of alternatives off-campus. This Court should, similarly, reject any attempt to, *post hoc*, suggest that religious meetings have ample alternate channels for invitation and direction – a burden not imposed on other categories of sign users.

---

[38] *Reed I*, 587 F.3d at 979, 980. Among the options listed by the court were: "distributing leaflets, sending email messages or mail advertisements, walking the sidewalks with signs advertising the church services, posting signs carrying religious messages on their own property, and advertising in the newspaper, phonebook or other print media." *Id.*

[39] *Widmar v. Vincent*, 454 U.S. 263, 288, 102 S. Ct. 269, 284 (1981)(White, J., dissenting)

B. Gilbert's Sign Code raises Establishment Clause concerns as it appears to favor larger religious groups.

As noted above, when compared to other portions of the sign code, Gilbert's scheme raises Free Exercise Clause concerns. Taking an additional step back, the facts in this case raise concerns about whether the Town of Gilbert may have *preferred* certain religious groups or activities. Both lower courts failed to consider at all whether Gilbert's special restrictions operated to prefer well-established, affluent, and popular religious groups at the expense of small, new, or minority religious assemblies, of whatever faith.

1. Congressional hearings found discrimination is well-disguised.

The legislative history of the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc, *et seq.*, identifies an all-too-common form of religious discrimination by local government:

> Churches in general, and new, small, or unfamiliar churches in particular, are frequently discriminated against on the face of zoning codes .... Sometimes, zoning board members or neighborhood residents explicitly offer race or religion as the reason to exclude a proposed church, especially in cases of black churches and Jewish shuls and synagogues. More often, discrimination lurks behind such vague and universally applicable reasons as traffic, aesthetics, or "not consistent with the city's land

> use plan." Churches have been excluded from residential zones because they generate too much traffic, and from commercial zones because they don't generate enough traffic.... The hearing record contains much evidence that these forms of discrimination are very widespread.[40]

Gilbert's sign code is not, *per se*, a "zoning ordinance," or "land use" regulation. But from an Establishment Clause perspective, Gilbert's Code attempts to zone Good News out of the Public Square, using a method of religious discrimination that Congress found to be commonplace. Good News is a small church, without a permanent facility; Good News is clearly not the church of Gilbert's affluent elite. Gilbert's justifications for its sign code include the same vague language about "traffic" or "aesthetics" that often masks a preference for a certain kind of religious group.

2. Southern Baptist small churches need signs for ministry.

Southern Baptist churches are, predominately, small congregations. Of approximately 46,000 churches, over half the local congregations contain less than 300 members. While about 2% of SBC churches reach "megachurch" size of over 2000 members, most

---

[40] 146 CONG. REC. S7774-5 (daily ed. July 27, 2000) (Joint Statement of Sen. Orrin Hatch and Sen. Edward Kennedy, *citing* Rep. of the House Committee on the Judiciary, H.R. REP. NO. 106-219, at 18-24). *See also* Douglas Laycock, *State RFRAs and Land Use Regulation*, 32 U.C. DAVIS L. REV. 755, 769-83 (1999).

congregations are small. Together, these big and small churches pool resources through the "Cooperative Program" budget, to coordinate ministry. This coordinated ministry includes disaster relief, education, and international missions, but also substantial efforts to "plant" new churches in the U.S. These church plants often start as small groups, without permanent facilities, focused on including people and places that are sometimes excluded elsewhere.

Some of these church planters report that signs are sometimes the best and only way to communicate with local marginalized groups. Mass-market advertising is often focused on the economically successful. The Gospel arrived with "good tidings of great joy, which shall be unto all people." Luke 2:10. Thus, Baptists are sensitive to efforts by local government to exclude congregations that are new, small, or made up of the poor or powerless.

3. Town may have had bad intentions to disfavor small churches.

Gilbert's conduct suggests a possible *purpose* of burdening small, new, non-traditional religious groups. First, the original ordinance was directed solely at "Religious Assembly Temporary Directional Signs."[41] This shows some preference for *permanent* signs, of the kind available to religious groups with land and money. Second, more recent revisions of the code show Gilbert trying to exclude Good News as an "out of town" group, as the location for services had moved just outside the

---

[41] *Reed I*, 707 F.3d at 1076.

Gilbert city limits.[42] But right-of-way aesthetics and the safety of drivers travelling to services have *nothing* to do with whether Good News's services are in the Town of Gilbert or merely nearby. The language and history of this Town's ordinance would lead a reasonable observer to question whether the Town is, in fact, intentionally favoring a particular *kind* of religious group.

Obviously, it would be an impermissible violation of the Establishment Clause to prefer one kind of religious group over another. *Lukumi* says: "In our Establishment Clause cases we have often stated the principle that the First Amendment forbids an official purpose to disapprove of a particular religion or of religion in general."[43] The Ninth Circuit's most recent opinion purports to address the "First Amendment" concerns with Gilbert's sign ordinance, but skips any establishment concerns.[44] In addressing the First Amendment concerns related to Gilbert's sign ordinance scheme, the Ninth Circuit compounded its error by failing to consider whether the Code was an effort to prefer certain kinds of churches over others, in violation of the Establishment Clause.

---

[42] *Id.* at 1081 n.2 (Watford, J., dissenting).

[43] *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532, 113 S. Ct. 2217, 2226 (1993).

[44] *Reed II*, 707 F.3d 1057, 1064 (9th Cir. 2013).

III. The Ninth Circuit's Test for Content Neutrality endangers Assembly Clause rights by protecting discrimination against certain meetings.

The Ninth Circuit's opinion also fails to mention the effect of the Code on the constitutionally protected activity of *assembly*.

Like speech and religion, the First Amendment guarantees the right to "peaceably assemble," sometimes encompassed within the right to "associate." While the legal analysis of assembly is similar to that of other First Amendment rights, it should have been an additional factor in the Ninth Circuit's analysis that should have prevented "relaxed scrutiny" of the Code.[45]

Good News's right to peaceably assemble is burdened by the Code. Good News says that when it reduces the number of its signs (due to Gilbert's Code), the church observes a drop in attendance.[46] The purpose of directional signs, of course, cannot be separated from their role in coordinating the actual meeting; for example, a person aware of the church, but relying on a series of signs, may not be able to find the service. A restriction on directional signs is, in effect, a restriction on the ability of the group to assemble to operate its meeting.

---

[45] *Id.*

[46] *Lukumi*, 508 U.S. at 532, 113 S. Ct. at 2226.

CONCLUSION

Bad laws cannot be saved by good intentions. For the foregoing reasons, your Amicus asks this Court to reverse the decision of the Ninth Circuit, to hold that the regulatory classifications Gilbert has drawn among different categories of non-commercial speech by non-profits are unconstitutional, and to remand the case to the district court for further proceedings consistent with this Court's decision.

Respectfully submitted,

JONATHAN R. WHITEHEAD
Counsel of Record
229 SE Douglas Street, Suite 210
Lee's Summit, Missouri 64063
(816) 398-8305
jon@whiteheadlawllc.com

MICHAEL K. WHITEHEAD
Whitehead Law Firm, LLC
1100 Main Street, Suite 2600
Kansas City, Missouri 64105
(816) 876-2600
mike@thewhiteheadfirm.com

Counsel for Amicus Curiae
MISSOURI BAPTIST CONVENTION
CHRISTIAN LIFE COMMISSION

APPENDIX

APPENDIX

TABLE OF CONTENTS

Appendix A BAPTIST FAITH AND MESSAGE (2000) App. 1

Appendix B RESOLUTIONS BY THE SOUTHERN BAPTIST CONVENTION App. 4

APPENDIX A

BAPTIST FAITH AND MESSAGE (2000)

Article VIII. The Lord's Day

The first day of the week is the Lord's Day. **It is a Christian institution for regular observance.** It commemorates the resurrection of Christ from the dead and should include exercises of worship and spiritual devotion, both public and private. Activities on the Lord's Day should be commensurate with the Christian's conscience under the Lordship of Jesus Christ.

Exodus 20:8-11; Matthew 12:1-12; 28:1ff.; Mark 2:27-28; 16:1-7; Luke 24:1-3,33-36; John 4:21-24; 20:1,19-28; Acts 20:7; Romans 14:5-10; I Corinthians 16:1-2; Colossians 2:16; 3:16; Revelation 1:10.

Article XI. Evangelism and Missions

It is the duty and privilege of every follower of Christ and of every church of the Lord Jesus Christ to endeavor to make disciples of all nations. The new birth of man's spirit by God's Holy Spirit means the birth of love for others. Missionary effort on the part of all rests thus upon a spiritual necessity of the regenerate life, and is expressly and repeatedly commanded in the teachings of Christ. The Lord Jesus Christ has commanded the preaching of the gospel to all nations. It is the duty of every child of God to seek constantly to win the lost to Christ by verbal witness undergirded by a Christian lifestyle, and by other methods in harmony with the gospel of Christ.

Genesis 12:1-3; Exodus 19:5-6; Isaiah 6:1-8; Matthew 9:37-38; 10:5-15; 13:18-30, 37-43; 16:19; 22:9-10; 24:14; 28:18-20; Luke 10:1-18; 24:46-53; John 14:11-12; 15:7-8,16; 17:15; 20:21; Acts 1:8; 2; 8:26-40; 10:42-48; 13:2-3; Romans 10:13-15; Ephesians 3:1-11; 1 Thessalonians 1:8; 2 Timothy 4:5; Hebrews 2:1-3; 11:39-12:2; 1 Peter 2:4-10; Revelation 22:17.

Article XVII Religious Liberty

God alone is Lord of the conscience, and He has left it free from the doctrines and commandments of men which are contrary to His Word or not contained in it. **Church and state should be separate**. The state owes to every church protection and full freedom in the pursuit of its spiritual ends. **In providing for such freedom no ecclesiastical group or denomination should be favored by the state more than others.** Civil government being ordained of God, it is the duty of Christians to render loyal obedience thereto in all things not contrary to the revealed will of God. The church should not resort to the civil power to carry on its work. The gospel of Christ contemplates spiritual means alone for the pursuit of its ends. The state has no right to impose penalties for religious opinions of any kind. The state has no right to impose taxes for the support of any form of religion. A free church in a free state is the Christian ideal, and this implies the right of free and unhindered access to God on the part of all men, and the right to form and propagate opinions in the sphere of religion without interference by the civil power.

Genesis 1:27; 2:7; Matthew 6:67, 24; 16:26; 22:21; John 8:36; Acts 4:19-20; Romans 6:1-2; 13:17; Galatians

5:1, 13; Philippians 3:20; 1 Timothy 2:1-2; James 4:12; 1 Peter 2:12-17; 3:11-17; 4:12-19.

APPENDIX B

RESOLUTIONS BY THE SOUTHERN BAPTIST CONVENTION

SBC Resolution: On a Call for Church Revitalization, Baltimore, MD – 2014

[Complete resolution at: http://www.sbc.net/resolutions/2243/on-a-call-for-church-revitalization]

WHEREAS, The Southern Baptist Convention has adopted a focus of planting churches to impact the darkness in our world (Matthew 5:16; 28:18–20); and

WHEREAS, The North American Mission Board has reported that 70 to 75 percent of cooperating churches in the SBC have plateaued or are in decline; and

* * *

NOW, THEREFORE, BE IT RESOLVED, That the messengers to the Southern Baptist Convention meeting in Baltimore, Maryland, June 10–11, 2014, recognize and affirm the mission of the North American Mission Board and all of our other SBC entities, working in cooperation with state conventions and local associations, to assist cooperating churches in church planting and church revitalization; ...

* * *

SBC Resolution: On Violations of Religious Freedom and Assembly in the United States, Houston, TX – 2013 (excerpts)

[Complete resolution at: http://www.sbc.net/resolutions/1237/on-violations-of-religious-freedom-and-assembly-in-the-united-states]

WHEREAS, God has granted religious freedom to humanity, even in matters of eternal significance (Genesis 2:16–17; Luke 13:34; Acts 4:19–21; 5:29; 17:16–34); and

WHEREAS, Religious freedom is an indispensable human right and an essential component of a free society; and

WHEREAS, Religious freedom by definition includes the freedom of the individual to live in accordance with his or her religiously-informed values and beliefs ... ; and

* * *

WHEREAS, Religious freedom must include the freedom of assembly based on religiously-informed beliefs and is guaranteed by the First Amendment of the United States Constitution; and

WHEREAS, In deciding NAACP v. Alabama, 357 U.S. 449 (1958) the United States Supreme Court declared, "It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech"; and

WHEREAS, In order to retain their official standing as a campus organization, Christian and other religious groups on some prominent college and university campuses are being required to allow into membership and leadership individuals who do not affirm the moral and religious convictions of the organizations; and

WHEREAS, Some people of faith are being denied the right to operate their businesses in a manner consistent with their religiously-informed beliefs, especially with regard to their convictions about homosexuality, resulting in loss of status, income, and livelihood; and

WHEREAS, Some officials and municipalities have discriminated against constitutionally-protected religious activities in public housing, public schools, and other tax-supported spaces; and

WHEREAS, Despite the long and honorable tradition of respect for religious freedom within the ranks of the United States armed services, many members of the United States military are experiencing heightened levels of animosity and hostility because of their faith; and

WHEREAS, Chaplains in the United States military are growing increasingly concerned about their freedom to minister to America's servicemen and women according to the dictates of their faith without fear of reprisal or intimidation; and

WHEREAS, The federal government is denying the right of its citizens to exercise their religious freedom by its insistence that they provide in their employee healthcare plans for contraceptives and abortion-causing drugs and devices; now, therefore, be it

RESOLVED, That the messengers to the Southern Baptist Convention meeting in Houston, Texas, June 11–12, 2013, express our gratitude for our God-granted religious freedom; and be it further

RESOLVED, That we call on college administrators to respect the right of students to freedom of association and stop requiring religious student groups to accept as members or select as leaders those who do not share their core religiously-informed beliefs; and be it further

* * *

RESOLVED, That we call on the current administration to uphold the constitutional protections accorded people of faith to provide healthcare for their employees that is consistent with their core religious beliefs; and be it further

* * *

RESOLVED, That we urge The Ethics and Religious Liberty Commission of the Southern Baptist Convention to continue its faithful defense and advocacy of the God-given and constitutionally-guaranteed rights of freedom of religion and assembly; ...

* * *

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
SEP 2 2 2014
OFFICE OF THE CLERK

No. 13-502

IN THE
Supreme Court of the United States

PASTOR CLYDE REED AND GOOD NEWS COMMUNITY CHURCH,
Petitioners,

v.

TOWN OF GILBERT, ARIZONA AND ADAM ADAMS, IN HIS OFFICIAL CAPACITY AS CODE COMPLIANCE MANAGER,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF FAMILY RESEARCH COUNCIL IN SUPPORT OF PETITIONERS

Travis Weber
Family Research Council
801 G Street NW
Washington, D.C. 20001
202-637-4617
tsw@frc.org

John P. Tuskey
Counsel of Record
50681 Elk Trail
Granger, Indiana 46530
574-612-7900
johntus@att.net

QUESTION PRESENTED

Does a city ordinance that on its face distinguishes signs based on the types of messages they bear—ideological, political, or directional—and applies different restrictions on signs based on the type of message a sign bears regulate speech based on its content?

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF THE ARGUMENT 1

ARGUMENT 3

I. BECAUSE THE GILBERT SIGN ORDINANCE ON ITS FACE IMPOSES DIFFERENT RETRICTIONS ON SIGNS BASED ON THE MESSAGES THAT THOSE SIGNS BEAR, THE ORDINANCE IS A CONTENT-BASED SPEECH REGULATION 3

II. THE NINTH CIRCUIT'S REASONING DOES NOT SUPPORT ITS CONCLUSION THAT THE ORDINANCE IS CONTENT-NEUTRAL 6

A. Under this Court's precedent, a law that on its face regulates speech based on its content is a content-based regulation regardless of the government's motive or justification 7

B. That the Gilbert ordinance does not draw distinctions based on content or viewpoint within the categories of Political Signs, Ideological Signs, and Temporary Directional Signs does not

logically lead to the conclusion that the distinctions the ordinance draws between those broader subjects are content-neutral 13

CONCLUSION 17

TABLE OF AUTHORITIES

Cases: **Page(s)**

Carey v. Brown, 447 U.S. 455 (1980) 8

Hill v. Colorado, 530 U.S.703 (2000) 8, 11, 12

Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575 (1983) 7, 10

Police Dep't. of Chicago v. Mosley, 408 U.S. 92 (1972) 8

R.A.V. v. City of St. Paul, 505 U.S. 703 (1992) 9, 15

Reed v. Town of Gilbert, 707 F.3d 1057 (9th Cir. 2013) 4, 5, 9, 11, 12, 13

Simon & Schuster v. Crime Victims Board, 502 U.S. 105 (1991) 7, 10

Turner Broadcasting Systems, Inc. v. FCC, 512 U.S. 622 (1994).....3, 5, 7, 8, 9, 10

United States v. Playboy Entertainment Group, Inc., 529 U.S. 803 (2000) 5

INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae Family Research Council is a non-profit organization located in Washington, D.C., that exists to develop and analyze government policies for consistency with traditional religious values and believes in protecting all people's rights to adhere to and pursue their religious beliefs. Integral to such pursuit of religion is the ability to gather and assemble in congregations for worship. Consequently, FRC has a strong interest in ensuring that religious congregations have the freedom to adequately communicate when and where they will meet—issues this case directly implicates.

SUMMARY OF THE ARGUMENT

A law that categorizes speech by its content and imposes different restrictions on speech based on which category that speech's content falls into regulates speech based on content. The Gilbert, Arizona, sign ordinance does precisely that. The ordinance on its face categorizes signs by the types of messages they bear—ideological, political, or directional—and applies different restrictions on signs based on the type of message a sign bears.

---

[1] Petitioners have lodged a blanket consent with the Court. Respondents' counsel have consented to the filing of this brief. A copy of Respondents' written consent has been enclosed with copies of this brief. No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and no person other than *amici curiae*, their members, or their counsel contributed money that was intended to fund preparing or submitting this brief.

Which restrictions apply to a sign thus depends entirely on the sign's message. Under this Court's precedents, the Gilbert ordinance regulates speech based on its content and can stand only if it survives strict scrutiny.

That Gilbert might have been attempting by its sign ordinance to further what it saw as a benign end—whether that be to promote ideological and political speech or to alleviate aesthetic and safety concerns—does not, as the Ninth Circuit panel majority thought, make the sign ordinance content-neutral. There is no "good intentions" exception to the requirement of content-neutrality. Asserting a benign or content-neutral purpose will not save from strict scrutiny a law that on its face regulates speech based on content. In any event, it is doubtful, to say the least, that signs bearing directional messages cause greater aesthetic or safety problems than signs bearing ideological or political messages. Moreover, government may not promote favored messages (or favored categories of messages) by imposing more onerous burdens on other messages.

It also does not matter, as the Ninth Circuit panel majority seemed to think, that the Gilbert ordinance treats equally signs *within* each of the categories of signs the ordinance regulates. That the ordinance treats all ideological signs alike, all political signs alike, and all directional signs alike does not mean that the ordinance is content-neutral; it means only that all signs bearing directional messages are treated less favorably than all signs bearing political or ideological messages. The equal treatment of signs within the different categories

thus does not support the Ninth Circuit panel majority's conclusion that the ordinance does not discriminate based on content. The Gilbert ordinance does discriminate based on content, and this Court should so hold.

ARGUMENT

I. BEAUSE THE GILBERT SIGN ORDINANCE ON ITS FACE IMPOSES DIFFERENT RESTRICTIONS ON SIGNS BASED ON THE MESSAGES THAT THOSE SIGNS BEAR, THE ORDINANCE IS A CONTENT-BASED REGULATION OF SPEECH

A bedrock principle of this Court's free speech jurisprudence is that government may not impose restrictions on speech based on the speech's content. As the Court stated in *Turner Broadcasting Systems, Inc. v. FCC*, 512 U.S. 622, 641 (1994), "[a]t the heart of the First Amendment lies the principle that each person should decide for him or herself the ideas and beliefs deserving of expression, consideration, and adherence." Therefore, the First Amendment "generally does not countenance government control over the content of messages expressed by individuals," and this Court thus applies "the most exacting scrutiny to regulations that suppress, *disadvantage*, or *impose differential burdens* upon speech because of its content." *Id.* at 642 (emphasis added).

In this case, the Town of Gilbert, Arizona, on the face of its ordinance regulating signs, has imposed differential burdens that disadvantage

certain speakers because of their speech's content. On its face, the ordinance distinguishes between signs bearing ideological messages—for example, "Stop the War" ("Ideological Signs")—signs bearing messages seeking to persuade voters to cast their election ballots in a certain way—for example, "Vote for Jones" ("Political Signs")—and messages announcing and directing people to events sponsored by non-profit organizations ("Temporary Directional Signs"). *See Reed v. Town of Gilbert*, 707 F.3d 1057, 1061 (9th Cir. 2013); *see id.* at 1079 (Watford, J., dissenting). The ordinance, on its face, enacts different requirements regarding size, placement, duration, and number for Ideological Signs, Political Signs, and Temporary Directional Signs that are more restrictive for Temporary Directional Signs. Those signs must be smaller than Ideological and Political signs, may be displayed only for a shorter period of time than Ideological and Political signs, may be placed in fewer places than Ideological and Political signs, and are subject to a limit on their number that Ideological and Political signs are not subject to. *See id.* at 1061.

Under the Gilbert ordinance, as written, determining how large a sign can be, where a sign can be placed, how long a sign may be placed, and how many signs can be placed on a particular piece of property requires knowing the message the sign bears, for which restrictions apply depends entirely on whether a sign's message is political, ideological, or directional. Thus, to say that the Gilbert sign ordinance regulates speech based on its content is really to state a tautology, akin to stating that a duck is a duck: An ordinance that imposes

restrictions on speech that depend on the speech's content regulates speech based on its content. It follows that as a content-based speech regulation, the ordinance is subject to "the most exacting scrutiny." *Turner Broadcasting*, 512 U.S. at 642. That exacting scrutiny requires that Gilbert demonstrate that the difference in restrictions placed on the various signs is the least restrictive means of serving a compelling government interest. *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813 (2000). Given Gilbert's asserted interests in aesthetics and safety, and given that it is difficult to imagine, for example, why a 20-square-foot sign bearing an ideological message causes less harm to those interests than a 20-square-foot sign bearing a directional message, it is doubtful Gilbert could meet that burden. *See Reed*, 707 F.3d at1080 (Watford, J., dissenting).

The Ninth Circuit panel majority in this case, however, did not apply the strict scrutiny that this Court's cases require for content-based speech restrictions. Rather, the majority found that the sign ordinance—despite the fact that the ordinance imposed its various restrictions based entirely on the content of a sign's message—was content-neutral. *See Reed*, 707 F.3d at 1067-73. The majority apparently found insufficiently "nuanced" the straightforward conclusion that a city regulates speech based on its content when it imposes restrictions on speech that depend on the speech's content. *See id. at* 1068 (stating that the Ninth Circuit has "fashioned a more nuanced standard" to determine whether a speech restriction is content-based). Two reasons in particular underlie the

majority's conclusion: First, the majority concluded that this Court has adopted an understanding of content-neutrality that allows a court to analyze the justification and motive for a speech regulation and to find the regulation content-neutral if the justification and motive are content-neutral, even when the regulation on its face applies the restriction based on content. *See id.* at 1069, 1071 ("Gilbert did not adopt its regulation of speech because it disagreed with the message conveyed"), 1072 ("Gilbert's interests in regulating temporary signs are unrelated to the content of the sign"). Second, the majority found it significant that the ordinance's restrictions on Political Signs, Ideological Signs, and Temporary Directional Signs apply equally to all signs within each category without regard to the particular content or viewpoint that those who seek to erect such signs wish to express. *See id.* at 1069, 1071, 1072. In the majority's view, this made the ordinance content-neutral despite the difference in restrictions between the three categories of signs. As the next section will demonstrate, neither of these reasons justifies the Ninth Circuit majority's decision.

II. THE NINTH CIRCUIT MAJORITY'S REASONING DOES NOT SUPPORT ITS CONCLUSION THAT THE SIGN ORDINANCE IS CONTENT- NEUTRAL

The Ninth Circuit panel majority's reasons for resisting the conclusion that an ordinance that imposes restrictions on speech that depend on the speech's content is content-based are either legally unsound, logically unsound, or both. The majority's

analysis fails to apply properly this Court's longstanding precedent and relies on a *non sequitur* to convert an obviously content-based speech regulation into a content-neutral regulation.

A. Under this Court's precedent, a law that on its face regulates speech based on its content is a content-based regulation regardless of the government's motive or justification.

In *Turner Broadcasting*, this Court noted that a content-based purpose or justification may be sufficient to show that a speech regulation is content-based. *See* 512 U.S. at 643. But a content-based purpose or justification, while perhaps sufficient, "is not necessary in all cases;" "illicit legislative intent is not a *sine qua non* of a violation of the First Amendment." *Id.* (quoting *Simon & Schuster v. Crime Victims Bd.*, 502 U.S. 105, 117 (1991) (quoting in turn *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 592 (1983)). And this Court made clear that a content-based purpose was unnecessary when a law on its face discriminates based on content: "the mere assertion of a content-neutral purpose [will not] be enough to save a law which, on its face, discriminates based on content." *Turner Broadcasting*, 512 U.S. at 642-43 (citation omitted). Thus, the Court in *Turner Broadcasting* went on to state the general rule that "laws that *by their terms* distinguish between favored and disfavored speech on the basis of ideas or views expressed are content-based." *Id.* at 643 (emphasis added).

The basic analysis for determining whether a speech regulation is content-based, as set forth in *Turner Broadcasting*, may be summed up as follows: First, a court must examine the regulation to determine whether on its face it regulates based on content. If it does, it is content-based, and a content-neutral justification does not change that. If (and only if) the regulation does not on its face regulate based on content, a court should go on to determine whether the regulation's underlying purpose or justification is content-based. *See, e.g., Turner Broadcasting*, 512 U.S. at 644-652; *Carey v. Brown*, 447 U.S. 455, 460-61 (1980) (law prohibiting all picketing except peaceful labor picketing, despite asserted content-neutral justification, was content-based because "on its face, [i]t accord[ed] preferential treatment to the expression of views on one particular subject matter"); *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 96 (1972) ("selective exclusions from a public forum may not be based on content alone and may not be justified by reference to content alone"); s*ee also Hill v. Colorado*, 530 U.S. 703, 747 (2000) (Scalia, J., dissenting) ("our very first use of the 'justified by reference to content' language made clear that it is a prohibition *in addition to*, rather than in place of, the prohibition of facially content-based restrictions") (citing *Mosley*, 408 U.S. at 96).

The analytical framework for determining content-neutrality set forth in *Turner Broadcasting* and followed consistently by this Court does not allow government to pursue what it might consider benign ends by the means of differential regulation of speech based on its content. Thus, the fact that

Gilbert regulates signs for the stated purpose of alleviating aesthetic and safety concerns does not justify the content-based regulatory distinctions on the ordinance's face. Likewise, the Ninth Circuit panel majority also erred in its apparent conclusion that the different restrictions on Political Signs, Ideological Signs, and Temporary Directional Signs were justified because the ordinance provision governing Political Signs "responds to the need for communication about elections," *Reed*, 707 F.3d at 1069, and the provision governing Ideological Signs "recognized that an individual's right to express his or her opinion is at the core of the First Amendment." *Id.* These supposedly benign purposes in no way explain why Directional Signs must be smaller, fewer in number, and disadvantaged in terms of placement as opposed to Political Signs and Ideological Signs. On its face, the ordinance, by granting more favorable treatment to Political Signs and Ideological Signs, necessarily exhibits favoritism toward the messages on those signs. In *Turner Broadcasting's* words, the ordinance "*by its terms* . distinguishes between favored and unfavored speech on the basis of ideas expressed." 512 U.S. at 643 (emphasis added). Promoting political and ideological messages may be a good thing, but to favor political and ideological messages by imposing more onerous restrictions on other messages violates this Court's admonition that "[g]overnment may not regulate based on hostility—or *favoritism*—towards the underlying message expressed." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 396 (1992) (emphasis added); *see also Turner Broadcasting*, 512 U.S. at 677-78 (O'Connor, J., concurring in part and dissenting in part) (the First Amendment "generally

prohibits the government from excepting certain kinds of speech from regulation because it thinks that speech is exceptionally valuable").

In short, there is no "good intentions" exception to the First Amendment's requirement of content-neutrality in speech regulation, for as this Court has made clear, "even regulation aimed at proper governmental concerns can unduly restrict the exercise of rights protected by the First Amendment." *Simon & Schuster*, 502 U.S. at 117 (quoting *Minneapolis Star*, 460 U.S. at 592). A good end (for example, promoting ideological or political speech, or alleviating traffic or safety concerns) does not justify the illicit (under the First Amendment) means of content-based speech regulation.

This conclusion makes perfect sense in light of the purposes the content-neutrality requirement serves. Where speech regulation may be necessary to (or at least appropriate for) achieving a legitimate government end (for example, alleviating concerns about visual clutter and safety associated with signs), the requirement that the regulation be content-neutral "spreads the pain" of the regulation rather than allowing this burden to fall disproportionately or even entirely on disfavored speakers. This generality of regulation thus "creates a substantial political check that prevents [regulation] from being unduly burdensome." *Turner Broadcasting*, 512 U.S. at 676 (O'Connor, J., concurring in part and dissenting in part). A person who knows that the messages he favors will be subject to the same regulation as messages he disfavors or does not care about is less likely to

support more burdensome regulation than is really necessary to achieve the end sought.

Moreover, the requirement of content-neutrality ensures that all speakers' messages will have equal standing (as far as the government is concerned) in the marketplace of ideas. Just as important, the requirement of content-neutrality also ensures that speakers will enter that marketplace knowing that the messages they wish to express will have equal standing. Despite whatever subjective "benign" purpose government may have for content-based speech restrictions, the speaker who—like Pastor Reed—is hamstrung by these restrictions will likely only see the government playing favorites; he will see that he cannot express his desired message in the same way and with the same force as others. He will be deprived, at least to some extent, of his equal standing in the marketplace of ideas and of his understanding that he has equal standing. To allow content-based speech regulation for supposedly benign purposes thus subverts the reasons for insisting on content-neutral speech regulation.

This Court's decision in *Hill v. Colorado*, 530 U.S. 703 (2000), on which the Ninth Circuit majority heavily relied, *see* 707 F.3d at 1070-72, 1073, did not change the basic analytical framework set out in *Turner Broadcasting* for determining whether a speech regulation is content-based. As Judge Watford noted in his dissent, the majority in *Hill* found that the Colorado statute at issue (at least purportedly) did not on its face draw any subject matter distinctions because it merely "prohibited all

non-commercial speech expressed through a particular mode of communication." *See Reed*, 709 3d at 1079 (Watford, J., dissenting) (citing *Hill*, 530 U.S. at 720-24).[2]

This Court's precedent is clear—laws that on their face restrict speech based on content are content-based restrictions and therefore subject to strict scrutiny. The Ninth Circuit panel majority's contrary decision is inconsistent with this precedent and subverts the purposes that the content-neutrality requirement serves.

---

[2] This is not to say that this *amicus* agrees with the decision in *Hill*. For the reasons stated in Justice Scalia's and Justice Kennedy's dissents, the *Hill* majority was wrong to treat "protest, education, [and] counseling," the activities forbidden by the Colorado statute in *Hill*, merely as modes of speech rather than as distinct subjects of messages. *See Hill*, 530 U.S. at 766-70 (Scalia, J., dissenting); *id.* at 743-49 (Kennedy, J., dissenting). But if one takes the *Hill* majority's characterization of protest, education, and counseling as correct, then the *Hill* majority's finding of facial content-neutrality is unexceptional and is not inconsistent with finding that the Gilbert ordinance discriminates on its face based on content. Of course, that the *Hill* majority's analysis would lead a federal court of appeals to conclude that the Gilbert ordinance—an ordinance that on its face differentiates expression by content and imposes different restrictions based solely on content—is somehow content-neutral is one more reason, in addition to those expressed in Justice Scalia's and Justice Kennedy's dissents, to overrule *Hill*.

B. That the Gilbert ordinance does not draw distinctions based on content or viewpoint *within* the categories of Political Signs, Ideological Signs, and Temporary Directional Signs does not logically lead to the conclusion that the distinctions the ordinance draws *between* those broader subjects are content-neutral.

The Ninth Circuit majority found it significant that the Gilbert ordinance does not distinguish among signs based on content or viewpoint within the different categories of signs the ordinance regulates. *See* 707 F.3d at1069, 1071, 1072.[3] In other words, the provision governing Ideological Signs does not distinguish between signs bearing the messages "Stop the War" and "Support Cancer Research" or "Stop the War" and "Support the War;" the provision governing Political Signs does not distinguish between signs bearing the messages

---

[3] 707 F.3d at 1069 ("It makes no difference which candidate is supported, who sponsors the event, or what ideological idea is asserted;" the content-neutrality within categories means that "the different types of exemptions for different types of noncommercial speech" are constitutional); 1071 ("Gilbert's Sign Code places no restrictions on the particular viewpoints of any person or entity that seeks to erect a Temporary Directional Sign and the exemption applies to all"); 1072 (noting that because the ordinance does not regulate Temporary Directional Signs' content or viewpoint, the sign ordinance is "content-neutral as defined by the Supreme Court"); 1072 ("As long as the Temporary Directional Sign exemption . . . is content-neutral . its constitutionality is not affected by" the different exemptions for Political or Ideological Signs).

"Smith for Mayor" and "Jones for Mayor;" and the provision governing Temporary Directional Signs does not distinguish between signs bearing the messages "Young Communists Meeting Today" and "John Birch Society Meeting Today." All this is true, but beside the point; this equal treatment *within* the various categories of signs does not, as the Ninth Circuit panel majority thought, support the conclusion that the distinctions the ordinance draws *between* Ideological Signs, Political Signs, and Temporary Directional Signs are not content-based.

A hypothetical will help explain why the majority's conclusion does not follow. Imagine an ordinance that regulates sound trucks and allows messages about football to be broadcast for four hours each day at 85 decibels but allows messages about baseball to be broadcast for only two hours each day at 80 decibels. With regard only to messages about football, the ordinance is entirely content and viewpoint-neutral; one can broadcast messages promoting games, discussing strategy and tactics, calling for the abolition of football because too many players suffer head injuries, or any other message regarding football. So also with baseball; one can broadcast messages promoting games, extolling or lamenting the designated hitter rule, discussing who should be the most valuable player, or any other message about baseball.

It is difficult to imagine that any court would find the hypothetical sound truck ordinance content-neutral. If the ordinance's stated purpose is to regulate noise, the distinction between baseball and football messages makes no sense in relation to that

purpose; 85-decibel messages about baseball are no more noisy than 85-decibel messages about football. And if the purpose is to promote football, not only the ordinance's face, but also its purpose, are content-based and impermissibly favor messages about football. *Cf. R.A.V.*, 505 U.S. at 396 ("the government may not regulate use [of a sound truck] based on hostility—or favoritism—towards the underlying message"); *id.* ("the power to proscribe particular speech on the basis of a non-content element (e.g., noise) does not entail the power to proscribe the same speech on the basis of a content element").

The hypothetical sound truck ordinance is not meaningfully distinguishable from the Gilbert sign ordinance. Both distinguish between different subjects and impose different restrictions based on those distinctions. If the sound truck ordinance is content-based because it imposes different restrictions on messages about baseball than it does on messages about football—even though it treats all messages about baseball alike and all messages about football alike—the Gilbert ordinance is content-based because it imposes different restrictions on signs bearing ideological messages, signs promoting political campaigns, and signs directing people to events—even though it treats all messages within each category alike.

This is so because just as the larger subject of baseball can be broken down into smaller subjects and different perspectives on those subjects (for example, the designated hitter rule and its pros and cons, the MVP race and who should win), so the

larger subject matter of directions to events can be broken down into smaller subjects often reflecting different perspectives (for example, directions to worship services, directions to the atheist society meeting). A law that differentiates between speech about baseball and speech about football and places greater restrictions on speech about baseball is a content-based restriction even though it does not single out specific messages within the broader subject of baseball for different treatment. Likewise, a law like the Gilbert ordinance that differentiates between ideological speech, political campaign speech, and speech directing people to events is content-based even though it does not single out specific messages within the broader subject of directional messages for different treatment. That the Gilbert ordinance treats all Political Signs alike, all Ideological Signs alike, and all Directional Signs alike does not mean that the ordinance is content-neutral when it treats Directional Signs less favorably; it means only that all signs bearing directional messages (content) are treated less favorably than all signs bearing ideological and political campaign messages. The Ninth Circuit panel majority's apparent conclusion that because the Gilbert ordinance treats all signs within each category the same, the ordinance does not discriminate based on content by treating Directional Signs *as a category* less favorably is a *non-sequitur*. That *non-sequitur* does not support the majority's ultimate conclusion that the Gilbert ordinance is content-neutral.

CONCLUSION

The Gilbert sign ordinance, on its face, distinguishes between and imposes different restrictions on signs based on the content of the messages the signs display. The ordinance is therefore content-based and is constitutional only if it survives strict scrutiny. The Ninth Circuit panel majority erred in finding otherwise. Therefore, this Court should reverse the Ninth Circuit's decision and remand this case to that court to determine if Gilbert can show that the ordinance's differential content-based treatment of different signs is the least restrictive means of advancing a compelling government interest.

Respectfully submitted this 22nd, day of September, 2014.

John P. Tuskey
Counsel of Record
50681 Elk Trail
Granger, Indiana 46530
574-612-7900
johntus@att.net

Travis Weber
Family Research Council
801 G Street NW
Washington, D.C. 20001
202-637-4617
tsw@frc.org

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
SEP 22 2014
OFFICE OF THE CLERK

No. 13-502

IN THE

Supreme Court of the United States

PASTOR CLYDE REED, *ET AL.*,
Petitioners,

v.

TOWN OF GILBERT, ARIZONA, *ET AL.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS IN SUPPORT OF PETITIONERS

TODD R. MCFARLAND
ASSOCIATE GENERAL COUNSEL
General Conference of Seventh-day Adventists
12501 Old Columbia Pike
Silver Spring, MD 20904
(301) 680-6321

GENE C. SCHAERR
Counsel of Record
Law Offices of Gene Schaerr
332 Constitution Ave. NE
Washington, DC 20002
(202) 361-1061
gschaerr@gmail.com

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

Does a government's mere assertion of a lack of discriminatory motive render neutral a speech regulation that is facially content-based?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

INTRODUCTION AND INTERESTS OF *AMICUS* 1

STATEMENT 2

SUMMARY OF ARGUMENT 6

ARGUMENT 8

I. Door-to-Door Proselytizing Plays As Important A Role In The Nation's First Amendment Tradition As The Sign-Based Expression At Issue Here. 8

A. Missionary proselytization through door-to-door literature distribution and solicitation has a long tradition in the United States. 8

B. The religious speech of door-to-door missionaries has long been recognized to be at the core of First Amendment protection. 13

II. In Combination With Local Regulations, The Ninth Circuit's Analysis Would Severely Curtail The First Amendment Rights Of *Amicus* And Other Faith Groups That Practice Door-To-Door Proselyting. 15

A. Door-to-door missionaries, including those sponsored by *amicus*, frequently encounter local regulations that

unconstitutionally suppress this protected religious speech. 15

B. Applied in the context of door-to-door evangelism, the Ninth Circuit's approach would facilitate widespread First Amendment violations. 18

CONCLUSION 23

TABLE OF AUTHORITIES

Page(s)

CASES

ACLU v. *Alvarez*, 679 F.3d 583 (7th Cir. 2012) 7

Buckley v. *American Const. Law Found., Inc.*, 525 U.S. 182 (1999) 18

Carroll v. President of Princess Anne, 393 U.S. 175 (1968) 16

City of Lakewood v. *Plain Dealer Pub. Co.*, 486 U.S. 750 (1988) 17

Consolidated Edison Co. of New York, Inc. v. *Public Service Comm'n of New York*, 447 U.S. 530 (1980) 17

Forsyth County v. *Nationalist Movement*, 505 U.S. 123 (1992) 17

Freedman v. *Maryland*, 380 U.S. 51 (1965) 17, 18

FW/PBS v. *City of Dallas*, 493 U.S. 215 (1990) 18

H.D.V.-Greektown, LLC v. *City of Detroit*, 568 F.3d 609 (6th Cir. 2009) 7

Hynes v. *Mayor of Oradell*, 425 U.S. 610 (1976) 18

Larson v. *Valente*, 456 U.S. 228 (1982) 17

Marks v. *United States*, 430 U.S. 188 (1977) 18

Martin v. *City of Struthers*, 319 U.S. 141 (1943) 16

Matthews v. *Town of Needham*, 764 F.2d 58 (1st Cir. 1985) 7

McIntyre v. *Ohio Elec. Comm'n*, 514 U.S. 334 (1995) 18

Melrose, Inc. v. *City of Pittsburgh*, 613 F.3d 380 (3rd Cir. 2010) 7

Meyer v. Grant, 486 U.S. 414 (1988) 15

Murdock v. *Com. of Penn.*, 319 U.S. 105 (1943) passim

Nat'l Adver. Co. v. *Town of Babylon*, 900 F.2d 551 (2nd Cir. 1990) 7

Neighborhood Enters., Inc. v. *City of St. Louis*, 644 F.3d 728 (8th Cir. 2011) 7

Police Dept. of City of Chicago v. *Mosley*, 408 U.S. 92 (1972) 17

Reed v. *Town of Gilbert (Reed I)*, 587 F.3d 966 (9th Cir. 2009) 4, 5

Riley v. National Fed'n of the Blind, 487 U.S. 781 (1988) 15

Schaumburg v. Citizens for a Better Environment, 444 U.S. 620 (1980) 15

Schultz v. *City of Cumberland*, 228 F.3d 831 (7th Cir. 2000) 18

Service Employees International Union, Local 5 v. *City of Houston*, 595 F.3d 588 (5th Cir. 2010) 7

Solantic, LLC v. *City of Neptune Beach*, 410 F.3d 1250 (11th Cir. 2005) 7

Southeastern Promotions v. Conrad, 420 U.S. 546 (1975) 16, 17, 18

Talley v. *California*, 362 U.S. 60 (1960) 18

Wag More Dogs, Ltd. Liab. Corp. v. *Cozart*, 680 F.3d 359 (4th Cir. 2012) 7

Watchtower Bible and Tract Society of New York v. *Village of Stratton*, 536 U.S. 150 (2002) ..... passim

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. 1 8

STATUTES

Act of Uniformity, 14 Car. 2 c. 4 (1662) 8

Licensing of the Press Act, 14 Car. 2 c. 33 (1662) 8

Privacy Act, Pub. L. 93-579, § 7, *as codified at* 5 U.S.C. § 552a 18

ORDINANCES

Alabaster, AL, Ordinance No. 12-008, Art. IV, § 18(e) 19, 21

Benthalto, IL Ordinance § 7-3-4 22

Benthalto, IL, Business Code § 7-2-2 19

Clinton, TN Ordinance § 9-102 20

Gilbert, AZ Land Development Code, Division 4, General Regulations, Art. 4.4 ..... 2, 3

Lenoir City, TN Code § 9-101 (2-4) 21

Warner Robins, GA, Ordinance 10-125 ..... 20, 21, 22

OTHER AUTHORITIES

American Bible Society, History of American Bible Society (available at http://www.americanbible.org/about/history) (last visited on Sept. 20, 2014) 9

Elizabeth Twaddell, *The American Tract Society, 1814-1860*, CHURCH HISTORY, Vol. 15, No. 2 (Cambridge UP Jun. 1946) pp. 116-132 (available at http://www.jstor.org/stable/3160400) (last viewed on Sept. 20, 2014) 9

Ellen G. White, THE PUBLISHING MINISTRY (1983) ... 10

Frank S. Mead & Samuel S. Hill, HANDBOOK OF DENOMINATIONS IN THE UNITED STATES (Abington Press 8th ed. 1987) 8, 9, 10

History of Mormonism, New York Period (available at http://historyof mormonism.com/mormon-history/new-york-period) (last visited on Sept. 20, 2014) 9

Jehovah's Witnesses, What is a Pioneer? (available at http://www.jw.org/en/publications/books/jehovahs-will/what-is-a-pioneer) (last visited Sept. 20, 2014) 11

Jehovah's Witnesses, Zion's Watch Tower and Herald of Christ's Presence Reprints (available at http://www.mostholyfaith.com/bible/ Reprints) (last visited Sept. 20, 2014) 11

John William Jones, CHRIST IN THE CAMP: OR, RELIGION IN LEE'S ARMY (1887) (available at https://archive.org/details/christincamporr00jonego og) (last visited on Sept. 20, 2014) 10

Holy Bible

Mark 16:15 ..... 1, 9

Matthew 28:19-20 ..... 1, 8

Moody Publishers, About Moody Collective (available at http://moodycollective.com/about-moody-collective) (last visited on Sept. 20, 2014) 11

Truman State Univerity, Pickler Memorial Library, Pamphlets in America, (available at http://library.truman.edu/microforms/pamphlets_in_american_history.asp) (last visited Sept. 20, 2014) 10

INTRODUCTION AND INTERESTS OF *AMICUS*[1]

Amicus curiae is a religious organization that follows the "Great Commission," given by Jesus Christ to his followers, to go into all the world and "preach the Gospel." See Matthew 28:19-20; Mark 16:15. A principal method by which *amicus* follows this evangelistic mandate is through door-to-door visits with potential converts—during which church members share their testimonies, discuss religious issues, pray, distribute religious literature and solicit charitable contributions to sustain these missionary activities. These evangelistic efforts, traditionally known as "colporteur" ministries, have a long history in this country. And *amicus* sponsors and supports one of the nation's oldest and largest colporteur ministries. The Ninth Circuit decision under review here seriously threatens the viability of those ministries by effectively requiring an organization challenging a speech-suppressive statute to demonstrate that the issuing government *intended* to discriminate on the basis of content—that is, that it acted with a discriminatory purpose.

Amicus General Conference of Seventh-day Adventists is the highest administrative level of the Seventh-day Adventist church and represents nearly 59,000 congregations with more than eighteen million

---

[1] No one (including a party or its counsel) other than the *amicus curiae,* their members and counsel authored this brief in whole or in part, or made a monetary contribution intended to fund its preparation or submission. All counsel of record received timely notice pursuant to Rule 37.2 of *amicus's* intent to file this brief, and all parties have consented to its filing in communications on file with the Clerk.

members worldwide. In the United States, the North American Division of the General Conference oversees the work of more than 5,000 congregations with more than one million members. The General Conference sponsors several missionary programs in which church members travel to various locations to evangelize local residents through door-to-door solicitation.

One of these is a student missionary effort known as the "Literature Evangelist" program. These student missionaries regularly encounter local speech-suppressive laws, which must be addressed through negotiation or litigation before these missionary activities may occur. A rule like that applied by the Ninth Circuit below—requiring an intent or purpose to discriminate based on content—would effectively foreclose pre-enforcement resolutions, and as a result would effectively eliminate this protected religious speech.

For these reasons, *amicus* is strongly interested in and concerned about both the outcome of this case and the analysis by which the Court reaches that outcome.

STATEMENT

In regulating the size, location, duration and quantity of signs posted in public, the Town of Gilbert treats such things as political and ideologically-based signs more favorably than others, including (as in this case) signs advertising regular church services. *See* Gilbert, AZ Land Development Code, Division 4, General Regulations, Art. 4.4; Pet. App. 25-55.

1. Although a permit is generally required for posted signs, certain types of signs, including political and ideological signs, are exempt from this require-

ment. *Id.* at 28-29. The sign ordinance allows temporary directional signs to be up to "6 feet in height and 6 square feet in area." *Id.* at 38. The ordinance also mandates that such signs "shall only be displayed up to 12 hours before, during, and 1 hour after the qualifying event ends." *Id.*

But political and ideological signs are treated more favorably. When posted on property zoned for nonresidential use, undeveloped Town property, and Town rights-of-way, political signs may be as large 32 square feet. *Id.* at 31. Also, political signs may be put up as much as 60 days before a primary election, and can remain up for as many as 15 days after a general election. *Id.* at 84. Ideological signs have no display duration restrictions, are permitted in all zoning districts, and may be up to "20 square feet in area and 6 feet in height." Id. at 32. Furthermore, while only four temporary event directional signs may be posted on a property, the number of political or ideological signs is not capped. *Id.* at 31-32, 38.

2. During the period relevant here, the Good News Community Church ("Good News") met in an elementary school for Sunday worship services. See *Reed* v. *Town of Gilbert (Reed II)*, 707 F.3d 1057, 1060 (9th Cir. 2013); Pet. App. 5a. Based on its understanding of Biblical scripture, Good News feels under commandment to invite the community to meet regularly with its congregation. *Id.* Accordingly, the church placed numerous signs around the elementary school early Saturday mornings advertising the worship service, and removed the signs following Sunday services. *Id.*

However, a city code compliance officer notified Good News via e-mail that it had violated the city's

ordinance regarding temporary directional signs for qualifying events. See *Reed* v. *Town of Gilbert (Reed I)*, 587 F.3d 966, 972 (9th Cir. 2009); Pet. App. 89a-90a. A few months later, a code compliance officer issued an advisory notice informing the Church that its signs violated the town's ordinance because they were posted outside of acceptable hours before and after an event, were placed in a public right of way, and did not have include an event date. Pet. App. 90a.

In response to the e-mail and advisory notice, Good News reduced the number of signs as well as the amount of time prior to the service that the signs were displayed. *Id.* It also mounted a facial and as-applied challenge to the city ordinance in Arizona federal court. *Id.*

3. In the ensuing litigation, Good News argued, among other things, that the sign restrictions violated the Free Speech and Equal Protection Clauses of the Constitution. *Id.* The district court denied Good News' motion for a preliminary injunction, finding that the city ordinance (1) was content-neutral, (2) passed the relevant intermediate level of scrutiny, (3) did not improperly favor commercial over noncommercial speech, and (4) did not violate equal protection because any disparate effects were unintentional. Pet. App. 93a.

On appeal, the Ninth Circuit unanimously affirmed the district court's denial of the preliminary injunction, finding the section of the ordinance dealing with temporary event signs (§ 4.402P) to be constitutional because it did not distinguish between types of qualifying events or sign content, and did not "impermissibly favor commercial speech over non-

commercial speech." Pet. App. 115a. However, the Ninth Circuit remanded for the district court to consider Good News' First and Fourteenth Amendment claims that the ordinance *as a whole* was not content neutral because it impermissibly distinguished between different types of noncommercial speech—allowing political and ideological signs to be larger, more numerous, and displayed longer than temporary event signs. *Id.*

On remand, the district court found the varying restrictions of the different types of signs to be permissible. See *Reed v. Town of Gilbert (Reed II DC)*, 832 F. Supp. 2d 1070, 1081 (D. Ariz. 2011); Pet. App. 72a-74a. The district court explained that under the Gilbert ordinance, to distinguish between signs a government officer "need only *skim* the sign to determine the speaker (e.g., is a non-profit speaking?) and the event at issue (e.g., does this relate to an election or a Qualifying Event?)," and not otherwise reach the content of the sign's message. Pet. App. 73a. On that basis the district court found the Town's regulatory scheme content-neutral, and that defendants were entitled to summary judgment on all issues. Pet. App. 83a.

On appeal a second time, a new panel affirmed the district court's grant of summary judgment. See Pet. App. 45a. Reiterating the district court's analysis, the *Reed II* majority found that the ordinance in question was content-neutral because the city "did not adopt its regulation of speech *because* it disagreed with the message conveyed." Pet. App. 31a (emphasis added). Thus, even though the ordinance required city officials to treat signs differently based on their content, because the court could find no explicit *intent* to discriminate in the sign code itself, the

code was considered content-neutral. Pet. App. 31a-32a. The majority also opined that ideological and political signs deserve greater constitutional protection than signs advertising public meetings—including the church services at issue here. Pet. App. 37a-38a, 40a.

SUMMARY OF ARGUMENT

Unfortunately, there is nothing in the logic or language of the Ninth Circuit's decision—especially its misguided analysis of content-neutrality—to keep its doctrinal contagion from spreading beyond the narrow realm of sign ordinances. Thus, the holding not only has ominous consequences for noncommercial speech in the context of signs, but it is also potentially harmful to the door-to-door proselytizing efforts of many religions. As demonstrated in Section I below, such proselytizing plays as important a role in the Nation's First Amendment history and traditions as the sign-based expression at issue here. Indeed, this Court has repeatedly held that, whether or not accompanied by literature sales and requests for contributions, such proselytizing is entitled to rigorous First Amendment protection. *E.g.*, *Murdock* v. *Com. of Penn.*, 319 U.S. 105, 108 (1943); *Watchtower Bible and Tract Society of New York* v. *Village of Stratton*, 536 U.S. 150 (2002).

Nor is the Ninth Circuit alone in allowing an ordinance to discriminate facially based on content if the ordinance lacks an overt discriminatory purpose. Four other circuits have reached the same conclusion.[2] These circuits are in conflict with five sister

---

[2] See *Melrose, Inc.* v. *City of Pittsburgh*, 613 F.3d 380, 389 (3rd Cir. 2010); *Wag More Dogs, Ltd. Liab. Corp.* v. *Cozart*, 680 F.3d

circuits that have held that any facially discriminatory ordinance is constitutionally defective.[3] For reasons well explained by petitioners, the latter holdings are correct, and the holdings of the Ninth Circuit and its allied sister circuits are wrong.

This brief offers an additional, powerful reason for reaching that same conclusion: By allowing local governments to determine subjectively, based on the content of the message, which category of protection and regulation the speech activity receives, the Ninth Circuit's approach would increase exponentially the likelihood of abuse by bureaucrats against unpopular religions—or all religions. Specifically, as shown in Section II, the Ninth Circuit's approach would enable local governments, hostile to a particular faith or all faiths, to hide behind the claim that their ordinance does not have a discriminatory purpose. And that approach would place nearly insurmountable obstacles in the paths of itinerant missionaries engaging in the longstanding American tradition of canvassing for converts.

359, 365 (4th Cir. 2012); *H.D.V.-Greektown, LLC* v. *City of Detroit*, 568 F.3d 609, 621-22 (6th Cir. 2009); *ACLU* v. *Alvarez*, 679 F.3d 583, 603 (7th Cir. 2012).

[3] See *Matthews* v. *Town of Needham*, 764 F.2d 58, 59-60 (1st Cir. 1985); *Nat'l Adver. Co.* v. *Town of Babylon*, 900 F.2d 551, 557 (2nd Cir. 1990); *Service Employees International Union, Local 5* v. *City of Houston*, 595 F.3d 588, 596 (5th Cir. 2010); *Neighborhood Enters., Inc.* v. *City of St. Louis*, 644 F.3d 728, 736 (8th Cir. 2011); *Solantic, LLC* v. *City of Neptune Beach*, 410 F.3d 1250, 1259-62 (11th Cir. 2005).

ARGUMENT

I. Door-to-Door Proselytizing Plays As Important A Role In The Nation's First Amendment Tradition As The Sign-Based Expression At Issue Here.

Religious proselytizing through face-to-face meetings with potential converts, accompanied by distribution of religious literature, has a history at least as long as that of the Nation itself. As this Court has recognized, such missionaries have been a "potent force in various religious movements down through the years." *Murdock* v. *Com. of Penn.*, 319 U.S. 105, 108 (1943). The same religious dissenters and nonconformists who fled England, with its Act of Uniformity, 14 Car. 2 c. 4 (1662), and its Licensing of the Press Act, 14 Car. 2 c. 33 (1662), later proposed, debated and eventually approved the Bill of Rights, with its strong protections for religion and religious speech. U.S. Const., Amend. 1. The result in this country has been a uniquely vibrant development and dissemination of religious views. See generally Frank S. Mead & Samuel S. Hill, HANDBOOK OF DENOMINATIONS IN THE UNITED STATES (Abington Press 8th ed. 1987) (cataloguing more than 225 American denominations).

A. Missionary proselytization through door-to-door literature distribution and solicitation has a long tradition in the United States.

The overall tradition of missionary proselytization predates the founding of our country by millennia, dating at least to the "Great Commission" given by Jesus Christ to his followers to go into all the world and "preach the Gospel." See Matthew 28:19-20; Mark 16:15. The particular form of evangelism involving the distribution of printed literature arose in

the mid-Fifteenth Century, shortly after Johannes Gutenberg's introduction of movable type for printing. Cf. *Murdock* v. *Com. of Penn.*, 319 U.S. 105, 108 n. 6 (1943) (collecting examples of this method of evangelism).

1. In early Nineteenth Century America, "the organization of individual evangelical activity was [seen as] the universally recognized panacea for the ills and sins of the world." Elizabeth Twaddell, *The American Tract Society, 1814-1860*, CHURCH HISTORY, Vol. 15, No. 2 (Cambridge UP Jun. 1946) pp. 116-132, at p. 116 (available at http://www.jstor.org/stable/3160400) (last viewed on Sept. 20, 2014). As a result, numerous evangelistic associations began missionary activity through the distribution of religious literature.

The American Tract Society was instituted in Boston for this purpose in 1814. In 1816, the American Bible Society was established in New York to distribute Bibles and study aids. See American Bible Society, History of American Bible Society (available at http://www.americanbible.org/about/history) (last visited on Sept. 20, 2014). Both organizations have remained active in the distribution of religious literature.

Organized in 1830, the Church of Jesus Christ of Latter-day Saints began missionary activities almost immediately thereafter. *See* Mead & Hill, HANDBOOK OF DENOMINATIONS, at pp. 134-141; History of Mormonism, New York Period (available at http:// historyofmormonism.com/mormon-history/new-york-period) (last visited on Sept. 20, 2014). These missionary activities have long included the distribution of religious literature. Cf. Truman State University,

Pickler Memorial Library, Pamphlets in America, (available at http://library.truman.edu/microforms/pamphlets_in_american_history.asp) (last visited Sept. 20, 2014) (catalogue of pamphlets).

During the Civil War era, chaplains and others often distributed Bibles and tracts. John William Jones, CHRIST IN THE CAMP: OR, RELIGION IN LEE'S ARMY (1887) (available at https://archive.org/details/christincamporr00jonegoog) (last visited on Sept. 20, 2014).

At approximately the same time, the Seventh-day Adventist Church was recognized and began sponsoring what were then called "colporteur" ministries. *See* Mead & Hill, HANDBOOK OF DENOMINATIONS, at 19-25. Early Adventist Church founder Ellen G. White called for "message-filled books, magazines and tracts to be scattered everywhere like the leaves of autumn." Ellen G. White, THE PUBLISHING MINISTRY 5 (1983). Taking this counsel to heart, the Adventist Church continues to use several methods of missionary activity that involve the distribution of religious literature through face-to-face meetings and door-to-door canvassing. These ministries have been active and continue to this day, cf. *Murdock* v. *Pennsylvania*, 319 U.S. 105, 109 n. 7 (1943) (noting these missionary efforts), though they are now known as "Literature Evangelism," with those participating in them referred to as "Literature Evangelists."

These ministries were joined in the 1870s when the denomination now known as Jehovah's Witnesses emerged. *See* Mead & Hill, HANDBOOK OF DENOMINATIONS, at 124-27. Jehovah's Witnesses have long focused upon distribution of the written word as part of their evangelistic mission, and almost

immediately began distributing *Watchtower* magazine. *See, e.g.*, Jehovah's Witnesses, Zion's Watch Tower and Herald of Christ's Presence Reprints (available at http://www.mostholyfaith.com/bible/ Reprints) (last visited Sept. 20, 2014) (collection of back issues starting July 1879). To this day, Jehovah's Witnesses sponsor active missionary efforts of this type. Their missionaries are now known as "pioneers," and may serve anywhere from 30 hours a month to full-time. *See,* Jehovah's Witnesses, What is a Pioneer? (available at http://www.jw.org/en/ publications/books/jehovahs-will/what-is-a-pioneer) (last visited Sept. 20, 2014).

A similar organization arose in 1894 when American evangelist Dwight L. Moody founded the "Bible Institute Colportage Association" in Chicago to distribute evangelical Protestant religious tracts and books. Now known as Moody Publishers, it continues to publish and distribute religious materials. See Moody Publishers, About Moody Collective (available at http://moodycollective.com/about-moody-collective) (last visited on Sept. 20, 2014).

As these examples show, American religious groups have a long history of seeking converts though personal appeals coupled with the distribution of religious literature. This practice, which is at the heart of the speech protected by the First Amendment, has long been integral to the vitality of American religious life.

2. The Adventist Church's literature evangelism program is designed not only to place literature in the home, but also to offer a range of religious services, all designed to promote the Adventist Church's evangelistic message. Students routinely pray with will-

ing homeowners, offer personal religious testimonies and perform religious counseling.

Another integral feature of these missionary programs is the solicitation of donations to support both the program and the Christian education of the student missionaries. Student missionaries are trained to explain that the literature is offered on a purely voluntary donation basis. They suggest a donation range for any books in which a homeowner might be interested, and describe the manner in which donations are used. This description includes a statement that a portion of any donation will be used for the student missionary's Christian education.

Although money may be involved (if a donation is received), literature is not sold by the missionaries. Missionaries routinely give literature to interested homeowners who do not want or are unable to make a donation. Missionaries are trained to attempt to leave some material, even if only a pamphlet, at every house where someone is willing to accept it. Missionaries also receive donations from persons who do not want any literature but just want to help. A typical donation ranges from $10 to $20, although donations above and below the suggested range frequently occur.

Donations are solicited for reasons beyond the obvious need to support the program and increase its outreach. For example, the Church has learned over the years that people are more likely to read what they value. A book that is simply "forced upon" a person is less likely to be valued than one accompanied by a voluntary financial gift in return. A contemporaneous donation often creates value for the book in the recipient's mind, and therefore makes it

more likely to be read. In addition, a voluntary donation often creates an allegiance or affinity between the donor and the cause the donation supports. As a result, the simple act of making a donation is frequently the first step in the donor's religious conversion.

In short, *amicus's* missionary programs are paradigmatic examples of religious speech in the long tradition of "colporteur" ministries in which evangelists go door-to-door distributing literature and soliciting potential converts.

B. The religious speech of door-to-door missionaries has long been recognized to be at the core of First Amendment protection.

This Court recognized the practical importance of such ministries almost three quarters of a century ago, in *Murdock* v. *Pennsylvania*, 319 U.S. 105 (1943):

> "The hand distribution of religious tracts is an age-old form of missionary evangelism ... [and] has been a potent force in various religious movements down through the years. This form of evangelism is utilized today on a large scale by various religious sects whose colporteurs carry the Gospel to thousands upon thousands of homes and seek through personal visitations to win adherents to their faith. It is more than preaching; it is more than distribution of religious literature. It is a combination of both. Its purpose is as evangelical as the revival meeting."

Id. at 108-09. While the name of this ministry may have changed—"colporteurs" are now identified by terms such as missionaries or evangelists—the na-

ture of the speech, and the need to protect that speech, remain as important as ever.

This Court revisited the issue of door-to-door religious ministries in *Watchtower Bible and Tract Society of New York* v. *Village of Stratton*, 536 U.S. 150 (2002), which made clear that door-to-door witnessing could not be subjected to municipal licensing restrictions. In reaching that decision, the Court noted that some of the Court's "early cases" invalidating such speech-restrictive laws "also recognized the interests a town may have in some form of regulation, particularly when the solicitation of money is involved." 536 U.S. at 162. However, after this remark and a review of *Murdock* and similar cases, the Court made the following definitive statement:

> "The rhetoric used in the World War II-era opinions that repeatedly saved [missionaries] from petty prosecutions reflected the Court's evaluation of the First Amendment freedoms that are implicated in this case. The value judgment that then motivated a united democratic people fighting to defend those very freedoms from totalitarian attack is unchanged. It motivates our decision today."

536 U.S. at 169. *Village of Stratton* thus reaffirmed the principle recognized in *Murdock,* namely, that door-to-door canvassing and distributing religious literature is protected First Amendment activity, even if money is involved.[4] Indeed, it is difficult to imagine

---

[4] This latter aspect of *Murdock* was not at issue in *Village of Stratton*, as it had been previously reaffirmed by the Court. See *Meyer v. Grant*, 486 U.S. 414, 422 n.5 (1988) ("charitable ap-

a more ringing endorsement of the "value judgment" embodied in *Murdock* than the Court's restatement of that judgment in *Village of Stratton*.

II. In Combination With Local Regulations, The Ninth Circuit's Analysis Would Severely Curtail The First Amendment Rights Of *Amicus* And Other Faith Groups That Practice Door-To-Door Proselyting.

While *Murdock* and *Village of Stratton*, properly understood, established that door-to-door missionary activities cannot be subjected to licensing requirements, most municipalities do not read those decisions that way. As a result, in many places door-to-door missionary activities remain subject to both licensing and other forms of regulation. And that is why, for *amicus*, the Ninth Circuit's approach is so troubling and, indeed, dangerous.

A. Door-to-door missionaries, including those sponsored by *amicus*, frequently encounter local regulations that unconstitutionally suppress this protected religious speech.

Unfortunately, many localities throughout the country have failed to heed the "value judgment" embodied in *Murdock* and *Village of Stratton*. Occasionally a municipality will ban *all* door-to-door activ-

---

peals for funds, on the street or door to door, involve a variety of speech interests—communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes" and is fully protected speech) (quoting *Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 632 (1980); accord *Riley v. National Fed'n of the Blind*, 487 U.S. 781, 788-89 (1988) (reaffirming that charitable solicitation is protected speech).

ity—which has long been recognized as unconstitutional. See *Martin* v. *City of Struthers,* 319 U.S. 141, 146-147 (1943). But most municipalities have interpreted the Court's observation in *Village of Stratton* that "a town may have [interests] in some form of regulation, particularly when the solicitation of money is involved, 536 U.S. at 162, 164-65, as *carte blanche* authority, not to ban such activity, but to apply their local licensing ordinances to all door-to-door missionary activities. These cities often require permits, frequently with an onerous application process, and permit fees—sometimes running into thousands of dollars–before student missionaries may engage in this protected speech. These cities also typically enforce these ordinances against *amicus's* missionaries through criminal prosecutions. Such ordinances therefore impose significant burdens upon *amicus's* ability to exercise its core First Amendment right of religious speech.[5]

Aside from blanket bans, these ordinances fall into two general categories. First, many municipalities attempt to regulate door-to-door activity any time money is involved—both when sales are made and when donations are solicited. Second, at least as frequently, a city will regulate only sales, and will exclude charitable solicitation. Under either scenario, these regulations often suffer from one or more of the following constitutional infirmities:

---

[5] Indeed, these ordinances are sometimes blatantly unconstitutional prior restraints under existing precedents of this Court. A prior restraint exists when public officials exercise "the power to deny use of a forum in advance of actual expression." *Southeastern Promotions v. Conrad,* 420 U.S. 546, 553 (1975); see also *Carroll v. President of Princess Anne,* 393 U.S. 175, 181 (1968).

- As discussed in more detail below (at 19-21), they often exempt from their coverage certain speakers, viewpoints and/or messages, creating content and viewpoint discrimination, see *Consolidated Edison Co. of New York, Inc.* v. *Public Service Comm'n of New York*, 447 U.S. 530, 537 (1980); *Police Dept. of City of Chicago* v. *Mosley*, 408 U.S. 92, 97-99 (1972); *Larson* v. *Valente*, 456 U.S. 228 (1982).
- They often give the issuing authority unfettered discretion to grant or deny the permit, discretion that is often enhanced by provisions allowing regulators unbound authority to require information beyond that specified in the law, see *City of Lakewood* v. *Plain Dealer Pub. Co.*, 486 U.S. 750, 757-58 (1988); *Forsyth County* v. *Nationalist Movement*, 505 U.S. 123, 131, 133 n.10 (1992).
- They often sweep too broadly, are not narrowly drawn, and are not the only reasonable alternative which has the least impact on First Amendment freedoms, see *Southeastern Promotions* v. *Conrad*, 420 U.S. 546, 559-60 (1975); *Freedman* v. *Maryland*, 380 U.S. 51, 58-59 (1965).
- They often fail to include required procedural safeguards to reduce the danger of prohibiting constitutionally protected speech, see *Southeastern Promotions* v. *Conrad*, 420 U.S. 546, 559-60 (1975); *Freedman* v. *Maryland*, 380 U.S. 51, 58-59 (1965).
- They often contain no time frame in which the permit must be granted or denied, see *FW/PBS* v. *City of Dallas*, 493 U.S. 215, 227-29 (1990).
- They often impose significant license fees, *Murdock*, 319 U.S. at 113-15.

- They often require applicants to provide a litany of personal information (including social security numbers in violation of the Privacy Act, Pub. L. 93-579, § 7, *as codified at* 5 U.S.C. § 552a), as well as detailed information regarding the sponsoring organization, *Village of Stratton*, 536 U.S. at 166-67; *McIntyre* v. *Ohio Elec. Comm'n*, 514 U.S. 334, 341-45 (1995); *Buckley* v. *American Const. Law Found., Inc.*, 525 U.S. 182, 198-99 (1999); *Talley* v. *California*, 362 U.S. 60, 63-65 (1960); *Schultz* v. *City of Cumberland*, 228 F.3d 831, 852 (7th Cir. 2000).

- They often are impermissibly vague, see *Hynes* v. *Mayor of Oradell*, 425 U.S. 610, 620 (1976); *Marks* v. *United States*, 430 U.S. 188, 196 (1977).

In short, while these ordinances are as diverse as the municipalities that pass them, like the sign ordinance in this case they frequently violate the First Amendment. Moreover, given the functional and doctrinal similarities between that ordinance and the solicitation ordinances applicable to door-to-door missionaries, *amicus* respectfully suggests that the latter should be closely considered as the Court formulates its conclusions and opinion in this case.

B. Applied in the context of door-to-door evangelism, the Ninth Circuit's approach would facilitate widespread First Amendment violations.

Indeed, if applied to regulation of door-to-door missionary activity, the Ninth Circuit's approach would lead to widespread violations of the First Amendment rights of *amicus* and similarly situated faith groups.

1. Municipalities often seek to skirt the First Amendment through content-based restrictions on

door-to-door religious proselytizing under the cloak of regulating peddling and solicitation.

One ploy is writing into their ordinances extensive exemptions that have the effect of discriminating on the basis of content. For instance, until challenged in litigation, the town of Alabaster, Alabama exempted from its charitable donations ordinance what it calls Civil Rights Organizations; the Boy and Girl Scouts of America; Parent Teacher Organizations, Parent Teacher Associations, and sports and band boosters of any private or public school in the county; any youth sports, band, or arts organization administered through the city, a private school in the city, or a public school in the county; and religious organizations *not* requesting donations or contributions when sharing a religious message. Ordinance No. 12-008, Art. IV, § 18(e). Thus, the Boy Scouts could stand at someone's doorway and ask for money without a permit, but the Pathfinders (the Seventh-day Adventists' equivalent) could not—much less adult Adventist missionaries. Discriminating based on speaker identity is just a sophisticated way of discriminating based on content, as a city official in Alabaster must first look to determine if the speech is a solicitation or a sale (which are treated differently), and then look at the speech's content and speaker to see if the speech is exempt.

Similarly, Benthalto, Illinois exempts "[a]ll *resident* charitable, non-profit organizations in this municipality which have been in existence for six (6) months or longer" from having to obtain a solicitation certificate. Benthalto, IL, Business Code § 7-2-2 (emphasis added). Similar exemptions are not available to non-residents. By discriminating on the basis of the speaker, the ordinance also discriminates on the

basis of content—given that different speakers will invariable value and embrace different messages.

Clinton, Tennessee has a similar scheme: It exempts from its peddling and solicitation ordinance "newsboys delivering newspaper subscriptions...persons selling agricultural goods, who, in fact, themselves produced the products being sold, [and] religious, charitable and civic organizations *of [the county]* that solicit no more than four (4) times per year." Clinton, TN Ordinance 9-102 (emphasis added); see also Warner Robins, GA, Ordinance 10-125 (outside religious solicitors must obtain a local sponsor to apply for a permit). A church outside the city or county will not likely have the same message as one inside the county, and thus identity-based discrimination is just content-based discrimination by another name.

Another common scheme for content discrimination is to distinguish peddling and selling from simple solicitation based on whether a good or service is exchanged. This allows a religion soliciting charitable donations—with the donor receiving nothing in return—to have fewer restrictions (i.e., no need to get a permit, or pay a fee) than a religion that offers religious material, such as a book, and/or invites someone to make a charitable donation in return. See, *e.g.*, Alabaster, AL Ordinance No. 12-008, Art. II, § 3. This in turn leads to discrimination on the basis of the content of the message—i.e., based on the extent to which a particular religious group emphasizes reading literature as a means of spiritual enlightenment, as opposed to financial sacrifice.

Likewise, cities often distinguish between those who merely speak and those who solicit charitable

donations, thus providing preferential treatment to someone knocking on peoples' doors to encourage, say, recycling, over someone distributing religious material and willing to accept an optional donation in return. See, *e.g.*, Warner Robins, GA, Ordinance 10-125. Or, local governments will create an arbitrary amount, such as $10.00, as the threshold at which a religious organization's missionary will be reclassified as a peddler and thus subject to greater restrictions. See Lenoir City, TN Code § 9-101 (2-4). Both types of regulations effectively discriminate on the basis of content—for example, based on the extent to which a speaker's message emphasizes financial contributions over other kinds of contributions.

All of these legal sleights-of-hand are content-based speech restrictions. Under each of them, the city official determining whether a permit is required, or the type of registration needed, has to look to the speech of the religious solicitor—and on that basis may treat different messages differently based on content. Hence, a missionary who comes to one's door to share a message of how to get to Heaven, leaves religious literature, and indicates she is open to receiving a charitable donation of any amount, will be more heavily regulated than someone trailing that missionary and delivering a message that accepting the same literature will be a ticket to Hell.[6]

---

[6] To make matters worse, how speech is classified is often left to the unfettered discretion of local officials. For example, Benthalto, Illinois allows the Chief of Police to "investigate the business and moral character of the applicant" and deny a permit "[i]f the facts show the applicant unfit to receive the license," with no published standards as to what makes one "unfit." Benthalto, IL Ordinance § 7-3-4. Warner Robins, Georgia gives the

2. If the Ninth Circuit's analysis stands, minority faiths—particularly those that are poorly represented in the community—will be hard pressed to fight ordinances like those described above.

First, the Ninth Circuit's approach permits local governments to discriminate based on the content of speech as long as a discriminatory purpose is not overt—which few municipalities will be foolish enough to reveal. In *Reed* the court found that the ordinance in question was content-neutral because the city "did not adopt its regulation of speech *because* it disagreed with the message conveyed." Pet. App. 31a (emphasis added). Thus, even though the ordinance required city officials to treat signs differently based on their content, because the court could find no explicit intent to discriminate in the sign code itself, the code was considered content-neutral. Pet. App. 31a-32a.

Second, the Ninth Circuit's approach allows the subjective judgment of local bureaucrats—who are likely to come under pressure from neighbors, family, friends, and voters—to dictate how speech is classified and what regulations apply, and thus what rights speakers have. Thus, municipalities will more easily be able to discriminate in favor of local churches, local charitable organizations, and local peddlers—and whatever messages they wish to convey—

---

city clerk discretion, without any published standards, to deny a permit as he or she sees fit, and a permit can be revoked at any time "if good moral conduct is not displayed while soliciting"—without any indication what that means. Warner Robins Ordinance 10-125.

and against a message that an out-of-town group wishes to share.

Third, even on its own terms, the Ninth Circuit's approach improperly favors some speech over other speech. The majority below upheld the Gilbert sign ordinance in part on the ground that ideological and political signs deserve greater constitutional protection than signs advertising church services. Pet. App. 37a-38a, 40a. As petitioners have explained (at Pet. Brief 43-47), speech about religious services is entitled to as much First Amendment protection as any other kind of speech. And under *Murdock* and *Village of Stratton,* the same is true of door-to-door evangelism.

CONCLUSION

The Ninth Circuit's decision should be reversed, not only for the reasons articulated by petitioners, but also because it would allow municipalities to defend other unconstitutional statutes on the specious grounds that the speech they burden isn't as valuable as other speech, and that a government can discriminate on the basis of content as long as the discrimination isn't overt. The Ninth Circuit's approach would thus give a green light to municipalities already sorely tempted to violate the First Amendment rights of religious bodies engaging in literature evangelism. That approach should be rejected, and the decision below reversed.

Respectfully submitted.

TODD R. MCFARLAND
ASSOCIATE GENERAL COUNSEL
General Conference of Seventh-day Adventists
12501 Old Columbia Pike
Silver Spring, MD 20904
(301) 680-6321

GENE C. SCHAERR
Counsel of Record
Law Offices of Gene Schaerr
332 Constitution Ave. NE
Washington, DC 20002
(202) 361-1061
gschaerr@gmail.com

SEPTEMBER 22, 2014

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
SEP 2 2 2014
OFFICE OF THE CLERK

No. 13-502

In the Supreme Court of the United States

PASTOR CLYDE REED AND GOOD NEWS COMMUNITY CHURCH,

Petitioners,

v.

TOWN OF GILBERT, ARIZONA, AND ADAM ADAMS, IN HIS OFFICIAL CAPACITY AS CODE COMPLIANCE MANAGER,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF JUSTICE AND FREEDOM FUND AS *AMICUS CURIAE* SUPPORTING PETITIONERS

Deborah J. Dewart
620 E. Sabiston Drive
Swansboro, NC 28584-9674
(910) 326-4554
debcpalaw@earthlink.net

James L. Hirsen
Counsel of Record
505 S. Villa Real Drive
Suite 208
Anaheim Hills, CA 92807
(714) 283-8880
james@jameshirsen.com

Counsel for Amicus Curiae

Becker Gallagher Cincinnati, OH Washington, D.C. 800.890.5001

Library of Congress
Law Library

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF *AMICUS CURIAE* 1

INTRODUCTION AND SUMMARY OF THE ARGUMENT 1

ARGUMENT 2

I. THE NINTH CIRCUIT ELIMINATES THE STRICT SCRUTINY REQUIRED FOR CONTENT-BASED STATUTES—EVEN THOSE THAT ARE VIEWPOINT NEUTRAL. 2

A. Content-Based Laws Must Be Subject To Strict Scrutiny To Protect Against Government Censorship. 3

B. Content-Based Exemptions Undercut The Rationale For A Regulation. 5

C. Content-Based Statutes Are Presumptively Invalid—But Not Invariably Invalid. 6

II. THE NINTH CIRCUIT ERASES THE DISTINCTION BETWEEN CONTENT DISCRIMINATION AND VIEWPOINT DISCRIMINATION. 10

A. Viewpoint Discrimination Is An Egregious Form Of Content Discrimination. 11

B. Viewpoint Discrimination And Content Discrimination Are Sharply Distinguished In Limited Public Fora. 14

C. Viewpoint Discrimination Did Not Merge With Content Discrimination As A Result Of *Ward's* Language Concerning The Government's Disagreement With A Message. 15

D. Viewpoint Discrimination Is Prohibited Even Within A Category of Proscribable Speech—But Content Discrimination Is Not. 18

III. THE NINTH CIRCUIT EVADES ITS OWN PRECEDENT. 19

IV. THE NINTH CIRCUIT ERODES FIRST AMENDMENT PROTECTION IN OTHER CONTEXTS. 25

CONCLUSION 28

TABLE OF AUTHORITIES

CASES

ACLU of Nevada v. City of Las Vegas,
466 F.3d 784 (9th Cir. 2006) 24

Arkansas Writers' Project, Inc. v. Ragland,
481 U.S. 221 (1987) 8, 12, 13

Ashcroft v. American Civil Liberties Union,
542 U.S. 656 (2004) 4

Bates v. State Bar of Ariz.,
433 U.S. 350 (1977) 27

Berger v. City of Seattle,
569 F.3d 1029 (9th Cir. 2009) 21

Brown v. Town of Cary,
706 F.3d 294 (4th Cir. 2013) 8, 13, 17, 18

Bullfrog Films, Inc. v. Wick,
847 F.2d 502 (9th Cir. 1988) 20

Burson v. Freeman,
504 U.S. 191 (1992) 3

Carey v. Brown,
447 U.S. 455 (1980) 5, 13

Chaplinsky v. New Hampshire,
315 U.S. 568 (1942) 18

Church of Lukumi Babalu Aye v. City of Hialeah,
508 U.S. 520 (1993) 6

City Council of Los Angeles v. Taxpayers for Vincent,
466 U.S. 789 (1984) 5, 6

City of Cincinnati v. Discovery Network, Inc.,
507 U.S. 410 (1993) 8, 12, 16, 17, 18

City of Los Angeles v. Alameda Books, Inc.,
535 U.S. 425 (2002) 23

Clark v. Cmty. for Creative Non-Violence,
468 U.S. 288 (1984) 3

Cogswell v. City of Seattle,
347 F.3d 809 (9th Cir. 2003) 20, 21

Cons. Edison Co. v. Public Serv. Comm'n,
447 U.S. 530 (1980) 11, 12, 13, 25

Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.,
473 U.S. 788 (1985) 6

Ctr. for Fair Pub. Policy v. Maricopa County,
336 F.3d 1153 (9th Cir. 2003) 23

Desert Outdoor Advertising, Inc. v. City of Moreno Valley,
103 F.3d 814 (9th Cir. 1996) 20, 24

First Nat. Bank of Boston v. Bellotti,
435 U.S. 765 (1978) 26

Foti v. City of Menlo Park,
146 F.3d 629 (9th Cir. 1998) 22, 25

G.K. Limited Travel v. City of Lake Oswego,
436 F.3d 1064 (9th Cir. 2006) 7, 22, 23

Greer v. Spock,
424 U.S. 828 (1976) 14

H.D.V.-Greektown, LLC v. City of Detroit,
568 F.3d 609 (6th Cir. 2009) 18

Hill v. Colorado,
530 U.S. 703 (2000) 12, 16, 17, 18

Hoye v. City of Oakland,
653 F.3d 835 (9th Cir. 2011) 21, 22, 25

Lamb's Chapel v. Center Moriches Union Free Sch. Dist.,
508 U.S. 384 (1993) 14, 15

Lehman v. Shaker Heights,
418 U.S. 298 (1974) 6, 14, 20

Long Beach Area Peace Network v. City of Long Beach,
574 F.3d 1011 (9th Cir. 2009) 24, 25

Matthews v. Town of Needham,
764 F.2d 58 (1st Cir. 1985) 13

Melrose, Inc. v. City of Pittsburgh,
613 F.3d 380 (3d Cir. 2010) 10

Menotti v. City of Seattle,
409 F.3d 1113 (9th Cir. 2005) 23

Metro Display Adver. v. City of Victorville,
143 F.3d 1191 (9th Cir. 1998) 20

Metromedia, Inc. v. City of San Diego,
453 U.S. 490 (1981) . 3, 7, 12

Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue,
460 U.S. 575 (1983) 8, 13

Nat'l Adver. Co. v. Town of Babylon,
900 F.2d 551 (2d Cir. 1990) 13

Nat'l Adver. Co. v. City of Orange,
861 F.2d 246 (9th Cir. 1988) 22, 24

Neighborhood Enterprises, Inc. v. City of St. Louis,
644 F.3d 728 (8th Cir. 2011) 8, 13

Police Department of Chicago v. Mosley,
408 U.S. 92 (1972) 25

R.A.V. v. City of St. Paul, Minnesota,
505 U.S. 377 (1992) *passim*

Rappa v. New Castle Cnty.,
18 F.3d 1043 (3d Cir. 1994) 5, 9, 10

Reed v. Town of Gilbert,
707 F.3d 1057 (9th Cir. 2013) 3, 10, 11, 19, 21

Regan v. Time, Inc.,
468 U.S. 641 (1984) 26, 27

Rosenberger v. Rector of the Univ. of Va.,
515 U.S. 819 (1995) 11, 14, 15, 20

Serv. Emp. Int'l Union, Local 5 v. City of Houston,
595 F.3d 588 (5th Cir. 2010) 8

Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.,
502 U.S. 105 (1991) 12, 13, 19, 24

Solantic, LLC v. City of Neptune Beach,
410 F.3d 1250 (11th Cir. 2005) 16, 18

Sorrell v. IMS Health Inc.,
131 S. Ct. 2653 (2011) 4, 27

Turner Broadcasting System, Inc. v. FCC,
512 U.S. 622 (1994) *passim*

United States v. Alvarez,
132 S. Ct. 2537 (2012) 4, 5

United States v. Playboy Entertainment Group, Inc.,
529 U.S. 803 (2000) 4

Wag More Dogs, LLC v. Cozart,
680 F.3d 359 (4th Cir. 2012) 18

Ward v. Rock Against Racism,
491 U.S. 781 (1989) 15, 16, 17, 18

Whitton v. City of Gladstone, Mo.,
54 F.3d 1400 (8th Cir. 1995) 8, 13

CONSTITUTION

U.S. Const. amend. I *passim*

INTEREST OF *AMICUS CURIAE*[1]

Justice and Freedom Fund, as *amicus curiae*, respectfully submits that the decision of the Ninth Circuit Court of Appeals should be reversed.

Justice and Freedom Fund is a California non-profit, tax-exempt corporation formed on September 24, 1998 to preserve and defend the constitutional liberties guaranteed to American citizens, through education, legal advocacy, and other means. JFF's founder is James L. Hirsen, professor of law at Trinity Law School and Biola University in Southern California and author of New York Times bestseller, *Tales from the Left Coast*, and *Hollywood Nation*. Mr. Hirsen is a frequent media commentator who has taught law school courses on constitutional law. JFF has made numerous appearances in this Court as *amicus curiae* in cases involving the First Amendment. Co-counsel Deborah Dewart is the author of a book, *Death of a Christian Nation*.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Content discrimination and viewpoint discrimination are distinct categories. They often overlap but are not identical. A facially content-based statute—such as Gilbert's Sign Code—may be viewpoint neutral. A facially content-neutral law may

---

[1] The parties have consented to the filing of this brief. *Amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to its preparation or submission.

mask viewpoint discrimination. The government may restrict a nonpublic forum to certain content and/or speakers but may not exclude an entire perspective or engage in viewpoint discrimination. The Ninth Circuit misses these nuances and collapses the two categories.

Where the government discriminates as to both content and viewpoint, the Ninth Circuit will reach the correct result. But where there is only content discrimination—as in this case—it will employ a lower level of scrutiny. The presence of content discrimination does not inevitably invalidate the statute, but it does require strict scrutiny. The Ninth Circuit mandates viewpoint discrimination in order to apply the higher standard. That is incorrect under longstanding precedent in this Court and even in the Ninth Circuit. This flawed approach fails to protect First Amendment rights against government censorship.

ARGUMENT

I. THE NINTH CIRCUIT ELIMINATES THE STRICT SCRUTINY REQUIRED FOR CONTENT-BASED STATUTES—EVEN THOSE THAT ARE VIEWPOINT NEUTRAL.

The Ninth Circuit misstates the argument and the underlying rationale:

> The thrust of Good News' challenge to the Sign Code is that its different restrictions for different types of noncommercial speech are inherently content-based *and thus unconstitutional*.

Reed v. Town of Gilbert, 707 F.3d 1057, 1069 (9th Cir. 2013) (emphasis added). The Court should have said "*and thus subject to strict scrutiny.*" Content-based regulations are not necessarily unconstitutional—but they must jump a higher hurdle. The more lenient time-place-manner standard is not "the most that the First Amendment requires of government legislation which infringes on protected speech." *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 518 n. 23 (1981). Content-based regulations are subject to a higher standard—even if they are viewpoint-neutral—to ensure protection for free speech.

A. Content-Based Laws Must Be Subject To Strict Scrutiny To Protect Against Government Censorship.

Facially content-based statutes risk censorship and thus are subject to strict scrutiny. Content regulation may be employed only where necessary to serve a compelling government interest. *R.A.V v. City of St. Paul, Minnesota*, 505 U.S. 377, 395-396 (1992); *Burson v. Freeman*, 504 U.S. 191, 199 (1992). Regulations unrelated to content are subject to intermediate scrutiny because they typically "pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue." *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 641-642 (1994); *see Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984). It is the *risk* of viewpoint discrimination, not its *presence*, that warrants heightened scrutiny.

Content-based governmental burdens must satisfy the same rigorous scrutiny as content-based bans:

> When the purpose and design of a statute is to regulate speech by reason of its content, special consideration or latitude is not accorded to the Government merely because the law can somehow be described as a burden rather than outright suppression.

United States v. Playboy Entertainment Group, Inc., 529 U.S. 803, 826 (2000). Although the Sign Code is not a complete prohibition, it is subject to strict scrutiny. Moreover, "the usual presumption of constitutionality afforded congressional enactments is reversed... and the Government bears the burden to rebut that presumption." *Id.* at 817; *see also United States v. Alvarez*, 132 S. Ct. 2537, 2543-44 (2012), citing *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656, 660 (2004).

Over the years, this Court has continued to apply strict scrutiny to content-based speech regulations. *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2664 (2011) ("Act 80 is designed to impose a specific, content-based burden on protected expression. It follows that heightened judicial scrutiny is warranted."); *United States v. Alvarez*, 132 S. Ct. at 2543 ("When content-based speech regulation is in question, exacting scrutiny is required.")

In *Alvarez*, this Court applied strict scrutiny to the Stolen Valor Act and found that even this narrow prohibition of false speech could not survive the test. *Id.* at 2551. In his lengthy dissent, Justice Alito did not dispute the standard of review—but rather discussed the government's compelling interest and inability to achieve it through narrower means. The Act's viewpoint neutrality was one factor that weighed in

favor of upholding the legislation. *Id.* at 2557 (Alito, J., dissenting). But for the majority, it was not enough to salvage the legislation.

B. Content-Based Exemptions Undercut The Rationale For A Regulation.

Gilbert's Sign Code is a maze of variations and exemptions, casting doubt on the safety and aesthetic purposes it cites. "If some groups are exempted from a prohibition on parades and pickets, the rationale for regulation is fatally impeached." *Carey v. Brown*, 447 U.S. 455, 465 (1980). The same is true for signage regulations. Exemptions applicable only to certain speech "create a risk of engaging in constitutionally forbidden content discrimination." *City Council of Los Angeles v. Taxpayers for Vincent,* 466 U.S. 789, 816 (1984).

Viewpoint neutral exemptions cannot save the scheme, contrary to the Third Circuit's unique approach: "[T]he state can exempt from a general ban speech having that content so long as the state did not make the distinction in an attempt to censor certain viewpoints or to control what issues are appropriate for public debate...." *Rappa v. New Castle Cnty.*, 18 F.3d 1043, 1065 (3d Cir. 1994). This Circuit would subject viewpoint-neutral exemptions to intermediate scrutiny. *Id.* But that confuses two overlapping but distinct concepts—content and viewpoint. Viewpoint neutrality may ultimately support a finding that the exemption passes strict scrutiny, but it does not mandate that result.

C. Content-Based Statutes Are Presumptively Invalid—But Not Invariably Invalid.

"[P]resumptive invalidity does not mean invariable invalidity." *R.A.V. v. City of St. Paul*, 505 U.S. at 390 n. 6. A facially content-based statute is not automatically unconstitutional. It might pass strict scrutiny—or it might fit within a recognized exception such as nonpublic fora. *See, e.g., Lehman v. Shaker Heights*, 418 U.S. 298, 301-304 (1974); *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U.S. 788, 806 (1985). Conversely, even a facially content-neutral law may be a facade that masks a discriminatory motive.

The analysis should begin with the text but it does not end there. Facial neutrality is a well-established minimum:

> To determine the object of a law, we must begin with its text, for the minimum requirement of neutrality is that a law not discriminate on its face.

Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 533 (1993). The facially neutral ordinance in *Lukumi Babalu* obscured the city council's discriminatory motive in the context of religious liberty. The same problem may occur with speech regulations. "[E]ven a regulation neutral on its face may be content-based if its manifest purpose is to regulate speech because of the message it conveys." *Turner Broadcasting*, 512 U.S. at 645-646. Content hostility may also occur when particular media are used disproportionately for certain types of messages. *Taxpayers for Vincent*, 466 U.S. at 824 n. 5. Good

News, for example, is a small church that relies on inexpensive temporary signs to inform the community of its church services.

The Ninth Circuit concluded that Gilbert's Sign Code is *viewpoint* neutral and therefore also *content* neutral, collapsing two independent concepts and improperly placing motive—rather than text—at the forefront of the analysis. The Court cited *G.K. Limited Travel v. City of Lake Oswego*, 436 F.3d 1064, 1071-72 (9th Cir. 2006) for support ("plaintiffs offer no evidence suggesting illicit motive or bias on the part of the City or...a desire to stifle certain viewpoints"). But in *G.K. Limited*, it was not certain content but a manner of communication—pole signs—the city restricted. The Ninth Circuit's approach erroneously permits a facially content-based statute to be deemed content-neutral, contrary to this Court's precedent. *Turner Broadcasting*, 512 U.S. at 642-643 ("Nor will the mere assertion of a content-neutral purpose be enough to save a law which, on its face, discriminates based on content.") The result is that some facially content-based statutes are subject to a lower level of scrutiny than required by this Court.

The Town cites safety and aesthetics to justify its Sign Code. But "aesthetic judgments are necessarily subjective, defying objective evaluation, and for that reason must be carefully scrutinized to determine if they are only a public rationalization of an impermissible purpose." *Metromedia,* 453 U.S. at 510 (striking down statute that allowed on-site commercial billboards but not non-commercial). Even regulations enacted to serve legitimate governmental purposes may unduly restrict First Amendment freedoms.

Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 592-593 (1983) ("We need not and do not impugn the motives of the Minnesota Legislature in passing the ink and paper tax. Illicit legislative intent is not the *sine qua non* of a violation of the First Amendment.")

Some other circuits recognize the proper place of motive in the analysis. In both *Neighborhood Enterprises* and *Whitton*, the Eighth Circuit cited this Court's admonition that "even when a government supplies a content-neutral justification for the regulation, that justification is not given controlling weight without further inquiry." *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429-430 (1993); *see Neighborhood Enterprises, Inc. v. City of St. Louis*, 644 F.3d 728, 737 (8th Cir. 2011), *Whitton v. City of Gladstone, Mo.*, 54 F.3d 1400, 1406 (8th Cir. 1995). Similarly, the Fifth Circuit opined that "[a] regulatory scheme that requires the government to examine the content of the message that is conveyed is content-based regardless of its motivating purpose." *Serv. Emp. Int'l Union, Local 5 v. City of Houston*, 595 F.3d 588, 596 (5th Cir. 2010), citing *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 230 (1987).

Other circuits eschew a consistent objective methodology that begins with the text. According to the Fourth Circuit, the government "cannot disguise a content-based restriction beneath a content-neutral justification." *Brown v. Town of Cary*, 706 F.3d 294, 303 (4th Cir. 2013). Quoting *Turner Broadcasting*, 512 U.S. at 642-43, this Circuit observes that assertion of a content-neutral purpose will not salvage a facially discriminatory statute. *Id.* at 304. The Court correctly

separates the issue of whether a law distinguishes content from whether it distinguishes *because of* content. *Id.* But the Fourth Circuit refuses to consistently apply strict scrutiny to facially content-based laws, complaining that "such an approach imputes a censorial purpose to every content distinction, and thereby applies the highest judicial scrutiny to laws that do not always imperil the preeminent First Amendment values that such scrutiny serves to safeguard." *Id.* at 302. Yet that is exactly what this Court requires—"the highest judicial scrutiny" and a presumption of invalidity—for facially content-based laws. Sometimes those laws serve a compelling government interest and pass the test. The Fourth Circuit's confusing approach would allow some facially discriminatory statutes to be deemed content neutral.

The Third Circuit acknowledges that "even if government is not intending to limit speech expressing a particular idea, content differentiation can still distort public debate." *Rappa v. New Castle Cnty.*, 18 F.3d at 1063 (striking down Delaware Code restrictions that prohibited campaign signs). Content discrimination does not hinge on viewpoint discrimination, and content distinctions on the face of a statute raises suspicions:

> Even when government asserts a motive to restrict speech other than antipathy towards particular content, a long history of governmental attempts to censor speech provides reason to suspect that a restriction that facially differentiates based on content is in fact often motivated by such antipathy.

Id. at 1062. Nevertheless, the Third Circuit adopted a "more flexible, context-specific approach" in *Rappa* that it later applied to content-based restrictions covering overlapping categories (advertising, business, and identification signs). The Circuit Court observed there was "no indication the City sought to 'censor certain viewpoints' when it articulated and applied these criteria." *Melrose, Inc. v. City of Pittsburgh*, 613 F.3d 380, 390 (3d Cir. 2010), citing *Rappa v. New Castle Cnty.*, 18 F.3d at 1065. Introducing motive at this juncture muddies analysis of the statute's text.

Facial neutrality merely begins the analysis—it does not end there. Even a facially neutral statute may hide discriminatory purposes. But where the statute is overtly content-based—as Gilbert's Sign Code is—it must be subjected to strict scrutiny.

II. THE NINTH CIRCUIT ERASES THE DISTINCTION BETWEEN CONTENT DISCRIMINATION AND VIEWPOINT DISCRIMINATION.

The Ninth Circuit weakens the standard of scrutiny because of its fundamental error in confusing content discrimination with viewpoint discrimination:

> *Because* Gilbert's Sign Code places no restrictions on the *particular viewpoints* of any person or entity that seeks to erect a Temporary Directional Sign and the exemption applies to all, *it is content-neutral* as that term has been defined by the Supreme Court.

Reed v. Town of Gilbert, 707 F.3d at 1072 (emphasis added). This truncated analysis fails to consider other comparable signs of the same size. When the Circuit

Court does consider Temporary Directional Signs, Ideological Signs, and Political Signs, the same confusion is evident:

> Each exemption is based on objective criteria and none draws distinctions based on the particular content of the sign. It makes no difference which candidate is supported, who sponsors the event, or what ideological perspective is asserted.

Id. at 1069. The Ninth Circuit's confusion conflicts with decades of precedent in this Court.

A. Viewpoint Discrimination Is An Egregious Form Of Content Discrimination.

When the government targets particular viewpoints, its constitutional violation is even more blatant than when it merely regulates content. "Viewpoint discrimination is...an egregious form of content discrimination." *Rosenberger v. Rector of the Univ. of Va.*, 515 U.S. 819, 828-829 (1995). Viewpoint discrimination is "but a subset or particular instance of the more general phenomenon of content discrimination." *Id.* at 831; *see also R.A.V. v. City of St. Paul,* 505 U.S. at 391. The two concepts overlap but are not identical—as confirmed by years of consistent precedent in this Court.

The First Amendment is hostile to content-based regulation even where the regulation "does not favor either side of a political controversy." *Cons. Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 537 (1980) (certain bill inserts were suppressed "precisely because they address[ed] controversial issues of public policy").

Id. This Court rejected the Commission's assertion "that a prohibition of all discussion, regardless of the viewpoint expressed" would not unconstitutionally suppress free speech. *Metromedia,* 453 U.S. at 518-519. The overlap—and distinction—was noted again in *Hill v. Colorado*, 530 U.S. 703, 722-723 (2000) ("Regulation of the subject matter of messages, though not as obnoxious as viewpoint-based regulation, is also an objectionable form of content-based regulation.")

In *Discovery Network*, this Court rejected the City's contention that the justification for its regulation of newsracks (safety and aesthetics) was content-neutral. *Discovery Network, Inc.*, 507 U.S. at 429. The Court explained that "the very basis for the regulation [was] the difference in content between ordinary newspapers and commercial speech," rejecting the City's argument that "discriminatory treatment is suspect...only when the legislature intends to suppress certain ideas." *Id.*, citing *Simon & Schuster, Inc. v. Members of N. Y. State Crime Victims Bd.*, 502 U.S. 105, 117 (1991). The same is true here—content is the very basis for the Town's differing signage restrictions. The regulations may be viewpoint neutral, but they are not content neutral. The statute itself—not merely the underlying legislature purpose—must be content neutral in order to qualify for the intermediate scrutiny applied to time-place-manner restrictions.

It is not enough for the government to declare—as the Town of Gilbert does—a content-neutral motive. "Nor will the mere assertion of a content-neutral purpose be enough to save a law which, on its face, discriminates based on content." *Turner Broadcasting*, 512 U.S. at 642-643); see also *Arkansas Writers'*

Project, 481 U.S. at 231-232; *Carey v. Brown*, 447 U.S. at 464-469. This Court has "consistently held that 'illicit legislative intent is not the *sine qua non* of a violation of the First Amendment.'" *Simon & Schuster,* 502 U.S. at 117, quoting *Minneapolis Star & Tribune*, 460 U.S. at 592.

Sometimes other circuits affirm the clear distinction evident in this Court's precedent, while other rulings echo the Ninth Circuit's confusion. The Eighth Circuit follows this Court:

> [T]he argument that a restriction on speech is content-neutral because it is viewpoint-neutral has been repeatedly rejected by the Supreme Court.

Neighborhood Enterprises, 644 F.3d at 736 (sign code was content-based because content determined whether an exemption applied), quoting *Whitton,* 54 F.3d at 1405 (citing *Cons. Edison*, 447 U.S. at 537). The First and Second Circuits have found content-based sign laws facially unconstitutional, with no reference to viewpoint discrimination. *Matthews v. Town of Needham*, 764 F.2d 58, 60 (1st Cir. 1985); *Nat'l Adver. Co. v. Town of Babylon*, 900 F.2d 551, 556-557 (2d Cir. 1990). The Fourth Circuit, on the other hand, follows the Ninth Circuit's erroneous pattern with its declaration that content neutrality bars only distinctions made with "censorial intent" to prefer certain speech over other speech. *Brown v. Town of Cary*, 706 F.3d at 301-302.

B. Viewpoint Discrimination And Content Discrimination Are Sharply Distinguished In Limited Public Fora.

When the government establishes a limited public forum, it may restrict content but viewpoint discrimination is prohibited. First Amendment rules in this context illuminate the difference between the two categories:

> [I]n determining whether the State is acting to preserve the limits of the forum it has created so that the exclusion of a class of speech is legitimate, we have observed a *distinction* between, on the one hand, *content discrimination*, which may be permissible if it preserves the purposes of that limited forum, and...*viewpoint discrimination*, which is presumed impermissible when directed against speech otherwise within the forum's limitations.

Rosenberger, 515 U.S. at 829-830 (emphasis added) (exclusion of religious perspective was impermissible viewpoint discrimination). The government may reserve a forum for discussion of certain topics (i.e., content) or certain speakers but may not exclude an entire perspective. *Id.* at 829; *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 389-390 (1993). Access to a government-created forum need not always be content neutral, but must be viewpoint neutral. *See, e.g.*, *Lehman v. Shaker Heights*, 418 U.S. 298 (City could restrict advertising on city buses, allowing commercial but not political ads); *Greer v. Spock*, 424 U.S. 828 (1976) (political candidates had no general right to distribute campaign literature on

military base, and regulations did not discriminate among candidates).

Upholding the Ninth Circuit would unwind precedents like *Rosenberger* and *Lamb's Chapel*. These cases show how the exclusion of an entire category of speech (e.g., religious) is viewpoint discriminatory. The Town does not ban a whole category, but it does impose differential burdens which it claims are not only viewpoint neutral – but content neutral. If the government can impose different burdens on certain categories of speech merely by alleging an innocent motive, it could easily take the next logical step and eliminate an entire category.

C. Viewpoint Discrimination Did Not Merge With Content Discrimination As A Result Of *Ward's* Language Concerning The Government's Disagreement With A Message.

In framing the rules for content-neutral time-place-manner restrictions, this Court described the "principal inquiry" as "whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). *Ward* involved a noise ordinance unrelated to content. This Court observed that a regulation is still valid even though it may incidentally impact some speakers more than others. *Id.* This language has been quoted so as to obscure the distinction between content and viewpoint discrimination.

The absence of viewpoint discrimination is not equivalent to content neutrality but may support a

court's finding of such neutrality in cases where a statute is *not* content-based on its face—unlike Gilbert's facially content-based Sign Code. In *Hill v. Colorado*, this Court found the statute at issue was not adopted "because of disagreement with the message it conveys." *Hill v. Colorado*, 530 U.S. at 719, quoting *Ward*, 491 U.S. at 791. This conclusion was supported by the Colorado court's holding that it applied "equally to all demonstrators, regardless of viewpoint." *Id.* Viewpoint neutrality is one factor a court may consider—where the statute is facially neutral. In this case it is not.

As the Eleventh Circuit observed several years ago, this Court has "return[ed] to its focus on the law's own terms, rather than its justification, in *City of Cincinnati v. Discovery Network,* 507 U.S. 410 (1993)." *Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250, 1259 n. 8 (11th Cir. 2005). In *Discovery Network*, this Court struck down a city ordinance that allowed noncommercial newspapers in news racks but banned commercial handbills, noting that "the very basis for the regulation is the difference in content." The absence of viewpoint discrimination did not change the result:

> True, there is no evidence that the city has acted with animus toward the ideas contained in respondents' publications, but just last Term we expressly rejected the argument that discriminatory treatment is suspect under the First Amendment only when the legislature intends to suppress certain ideas.

Discovery Network, 507 U.S. at 429 (citation omitted). This Court expressly noted that *Ward* did not "compel a different conclusion." *Id.* at 429.

In addition to *Ward*, some courts look to a passage in *Hill v. Colorado* to minimize the need to examine a statute's content. But the context in *Hill* is critical:

> It is common in the law to examine the content of a communication to determine the speaker's purpose. Whether a particular statement constitutes a *threat, blackmail, an agreement to fix prices, a copyright violation, a public offering of securities, or an offer to sell goods* often depends on the precise content of the statement. We have never held, or suggested, that it is improper to look at the content of an oral or written statement in order to determine whether a rule of law applies to a course of conduct.

Hill v. Colorado, 530 U.S. at 721 (emphasis added). Each italicized example involves a specific "rule of law" where content is uniquely relevant to legal rights and/or liability. This quote is not a free pass for content-based regulation of protected speech—as *Hill* acknowledges: "The First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic." *Id.* at 723 n. 31 (citations omitted).

Circuit courts have gone astray quoting *Ward's* "disagreement with the message" language. The Fourth Circuit would uphold even a facially content-based statute if it was not adopted because of disagreement with the message. *Brown v. Town of*

Cary, 706 F.3d at 302; *Wag More Dogs, LLC v. Cozart*, 680 F.3d 359, 366 (4th Cir. 2012). The Sixth Circuit, examining a city's differential treatment of advertising, business, political, and identification signs, skirts the distinction between content and viewpoint discrimination with a similar reference to *Ward*—criticizing the Eleventh Circuit *Solantic* decision for its "overly narrow conception of the definition of content-neutral speech." *H.D.V Greektown, LLC v. City of Detroit*, 568 F.3d 609, 621-622 (6th Cir. 2009).

This case is an opportunity for this Court to bring needed clarity to its prior jurisprudence in *Ward*, *Discovery Network*, and *Hill*.

D. Viewpoint Discrimination Is Prohibited Even Within A Category of Proscribable Speech—But Content Discrimination Is Not.

Certain rare speech categories may be regulated "because of their constitutionally proscribable content"—e.g., obscenity, defamation, fighting words. *R.A.V.*, 505 U.S. at 383-384. Generally, these areas are "of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Id.*, quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942). Moreover, there is little danger of viewpoint discrimination "[w]hen the basis for the content discrimination consists entirely of the very reason the entire class of speech is proscribable." *R.A.V.*, 505 U.S. at 388.

But even in this context, the ability to discriminate has limits. Obscenity may be prohibited—but not "only that obscenity which includes offensive *political* messages." *Id.* at 388. The same is true of libel—the government "may not make the further content discrimination of proscribing *only* libel critical of the government." *Id.* at 384. Such further discrimination quickly morphs into viewpoint discrimination, "rais[ing] the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace." *Id.* at 387, quoting *Simon & Schuster*, 502 U.S. at 116. And it is precisely because of this danger that even seemingly benign content discrimination must be subjected to strict judicial scrutiny.

III. THE NINTH CIRCUIT EVADES ITS OWN PRECEDENT.

In *Reed*, the Ninth Circuit abandoned its own case law as well as this Court's precedent. Earlier cases distinguish between content and viewpoint discrimination, apply strict scrutiny, and analyze statutes facially before considering hidden motives.

Content v. Viewpoint Discrimination. Viewpoint neutral statutes—like those in the Town of Gilbert—may nevertheless be content-based. The two concepts are distinct:

> Even if the regulations could be deemed neutral with respect to their burden on viewpoint, they may still be found to "interfere" with the exercise of plaintiffs' free speech interests if they improperly discriminate between exercises of

> protected speech on the basis of content (citations omitted).

Bullfrog Films, Inc. v. Wick, 847 F.2d 502, 510 (9th Cir. 1988). This is hardly an isolated ruling. The Ninth Circuit continued to understand that content-based regulations present constitutional problems: *Desert Outdoor Advertising, Inc. v. City of Moreno Valley*, 103 F.3d 814, 820 (9th Cir. 1996) (city violated First Amendment because it regulated noncommercial speech on the basis of content).

Indeed, the Ninth Circuit cited "the *difference* between content discrimination and viewpoint discrimination" to sharply distinguish nonpublic forum cases such as *Lehman v. Shaker Heights*, 418 U.S. 298—where content discrimination is permissible (all political ads were prohibited, not merely ads supporting Lehman). *Metro Display Adver. v. City of Victorville*, 143 F.3d 1191, 1194 (9th Cir. 1998) (emphasis added). Viewpoint discrimination is prohibited even in a nonpublic forum. In *Metro Display*, an advertising company built bus shelters for the City in exchange for the right to sell advertising space on the shelters. When a local supermarket chain complained about a labor union's hostile ads, the City asked the company to remove them. This demand was based entirely on the pro-union viewpoint of the ads—impermissible even if the bus shelters were considered a nonpublic forum.

More recently, the Ninth Circuit noted that "discrimination against speech because of its message is presumed to be unconstitutional." *Cogswell v. City of Seattle*, 347 F.3d 809, 814 (9th Cir. 2003), citing *Rosenberger*, 515 U.S. at 828. *Cogswell* involved a

nonpublic forum where subject matter was properly restricted (candidate self-discussion) but there was no evidence of viewpoint discrimination. The Court explained that "[t]he line between an acceptable subject matter limitation and unconstitutional viewpoint discrimination is not a bright one." *Id.* at 815. But whether bright or blurry—there *is* a line—a line the Ninth Circuit erases in *Reed*.

The Ninth Circuit has forgotten its own statement that "[a] regulation is content-based if...the regulation, by its very terms, singles out particular content for differential treatment." *Berger v. City of Seattle*, 569 F.3d 1029, 1051 (9th Cir. 2009) (en banc). Citing this case, the Court found an "epitome of a content-based speech restriction" where the City of Oakland distinguished speech that facilitates access to clinics from speech that discourages it. *Hoye v. City of Oakland*, 653 F.3d 835, 851 (9th Cir. 2011).

In *Hoye*, the Ninth Circuit adopted the very approach it now rejects—examining the face of a statute to determine whether it "draws distinctions among *subjects* of discussion, not among *means or types* of communication." *Id.* at 847. Gilbert's Sign Code "draws distinctions" on the basis of content and then sets different standards depending on that content. But as in *Hoye*, the text should be analyzed first, even though there is no evidence of viewpoint discrimination:

> Hoye does not contend that the statute was enacted because of substantive disagreement with the message of the speech it regulates, nor does the record contain any evidence that it was. *We must therefore examine whether the*

> *Ordinance's substantive terms make facial distinctions between categories of speech based on content.*

Hoye v. City of Oakland, 653 F.3d 835, 846 (9th Cir. 2011) (emphasis added).

Exemptions. In prior cases, the Ninth Circuit admits that content-based exemptions may be constitutionally flawed:

- *Foti v. City of Menlo Park*, 146 F.3d 629, 636-637 (9th Cir. 1998) (ordinance banned all signs on all public property, but exemptions for "open house" real estate signs and safety, traffic, and public informational signs were content-based and therefore facially unconstitutional);
- *National Advertising Co. v. City of Orange*, 861 F.2d 246, 248 (9th Cir. 1988) (exemptions for offsite noncommercial signs turned on whether they conveyed messages approved by the ordinance);
- *G.K. Limited Travel*, 436 F.3d at 1070 (City did not appeal District Court's ruling that exemptions for danger signs, official notices, "no solicitation" signs, and temporary signs for charitable fundraising events were content-based).

Government Motive. The Ninth Circuit repeatedly affirms that content neutrality is determined objectively by examining the face of a statute—without the need to consider the government's intent to restrict viewpoint:

- *Menotti v. City of Seattle*, 409 F.3d 1113, 1129 (9th Cir. 2005) (emergency order established a restricted zone to curb violence around the World Trade Conference) ("In assessing whether a restraint on speech is content neutral, we do not make a searching inquiry of hidden motive; rather, we look at the literal command of the restraint.");

- *Ctr. for Fair Pub. Policy v. Maricopa County*, 336 F.3d 1153, 1164 (9th Cir. 2003) (same—facially content-based statute restricted hours for sexually oriented businesses to combat secondary effects);

- *G.K. Limited Travel*, 436 F.3d at 1071, quoting *Menotti*, 409 F.3d at 1129 (citing *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 448 (2002) (Kennedy, J., concurring)) ("[W]hether a statute is content neutral or content based is something that can be determined on the face of it; if the statute describes speech by content then it is content based.")

In *G.K. Limited*, the Ninth Circuit considered the relevant factors in the proper order. First, the Court noted that "[t]he Code restricts all pole signs across the City's general commercial zones without creating exceptions for preferred content." *G.K. Limited Travel*, 436 F.3d at 1071. Thus the law was facially content-neutral. Second, the Court observed that "plaintiffs offer no evidence suggesting illicit motive or bias on the part of the City or that the City banned pole signs in general, or their pole sign in particular, because of a desire to stifle certain viewpoints." *Id.* at 1072. Three

years later, the Ninth Circuit was even more explicit about the standard it now rejects:

> A law is content-based rather than content-neutral if "the main purpose in enacting it was to suppress or exalt speech of a certain content, *or it differentiates based on the content of speech on its face.*" *ACLU of Nevada v. City of Las Vegas*, 466 F.3d 784, 794 (9th Cir. 2006). Though "an improper censorial motive" is sufficient, such a motive is not necessary to render a regulation content-based. *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 117 (1991).

Long Beach Area Peace Network v. City of Long Beach, 574 F.3d 1011, 1024 (9th Cir. 2009) (emphasis added). Viewpoint discrimination—if it is known, and particularly if it appears in the text—is sufficient. But it is not essential. Facially content-based laws may be enacted for legitimate reasons with no illicit motive, but they are still subject to strict scrutiny to preserve First Amendment values.

Level of Scrutiny. Finally, past Ninth Circuit cases correctly apply strict scrutiny to content-based statutes:

- *National Advertising Co. v. City of Orange*, 861 F.2d at 249 (exceptions to noncommercial speech restrictions on billboards are unconstitutional unless narrowly tailored to serve a compelling state interest);
- *Desert Outdoor Advertising, Inc. v. City of Moreno Valley*, 103 F.3d at 820 (same—content-based sign restrictions);

- *Foti v. City of Menlo Park*, 146 F.3d at 635 (same—sign restrictions);
- *Long Beach Area Peace Network v. City of Long Beach*, 574 F.3d at 1024 (content-based regulations subject to strict scrutiny—event permits);
- *Hoye v. City of Oakland*, 653 F.3d at 853 (content-based regulations are presumptively invalid—must serve compelling state interest in least restrictive manner).

In short, the Ninth Circuit either has amnesia or has deliberately cast aside years of its own precedent.

IV. THE NINTH CIRCUIT ERODES FIRST AMENDMENT PROTECTION IN OTHER CONTEXTS.

The First Amendment demands that courts maintain a high standard of review for all content-based statutes. "[O]ur people are guaranteed the right to express any thought, free from government censorship. The essence of this forbidden censorship is content control." *Police Department of Chicago v. Mosley*, 408 U.S. 92, 96 (1972) (striking down law that permitted peaceful picketing only for labor disputes). Under the First Amendment, the government "has no power to restrict expression because of its message, its ideas, its subject matter, *or its content*." *Id.* at 95 (emphasis added). Content-based regulations, even when they appear to be viewpoint neutral, open the door for government to choose the "permissible subjects for public debate" and thereby "control...the search for political truth." *Cons. Edison Co.*, 447 U.S. at 538. When an even-handed law contains content-based

exemptions, the risk remains—the government is positioned to favor one side of a public debate. *First Nat. Bank of Boston v. Bellotti,* 435 U.S. 765, 785-786 (1978).

This Court's decision in *R.A.V.* illustrates the hazards of the Ninth Circuit's approach. The ordinance at issue was facially content-based because it applied only to "fighting words" that insulted or provoked violence "on the basis of race, color, creed, religion or gender." *R.A.V.*, 505 U.S. at 391. Other equally vicious "fighting words"—not addressed to one of these subjects—were not prohibited. *Id.* Apparent viewpoint neutrality could not salvage the flawed ordinance: "Displays containing some words—odious racial epithets, for example—would be prohibited to proponents of all views." *Id.* at 392. This Court explained that "[i]n practical operation" the ordinance went "beyond mere content discrimination, to actual viewpoint discrimination." *Id.* For example, the ordinance apparently did not prohibit "fighting words" in favor of racial tolerance, but would silence opponents. *Id.* However innocent or even laudable the government's motives, the First Amendment requires that courts dig deeper and strictly scrutinize content-based laws.

The government cannot render value judgments based on content. In *Regan v. Time, Inc.*, 468 U.S. 641 (1984), the government had enacted a statute during the Civil War that prohibited all photographic reproductions of currency. Initially this was to curb the printing of counterfeit currency but decades later the Treasury Department began to grant exceptions for educational and newsworthy purposes, e.g., in books,

magazines, journals. There was no hint of viewpoint discrimination, but this Court found the statutory scheme unconstitutional, explaining that "[a] determination concerning the newsworthiness or educational value of a photograph cannot help but be based on the content of the photograph and the message it delivers." *Id.* at 648. However legitimate the government's purpose—maintaining the integrity of our currency—it would be dangerous to allow government to control content based on "newsworthiness" or "educational value." Such power risks stifling public debate in other contexts.

One of those other contexts is commercial speech, where consumers have an interest in the free flow of information. *Bates v. State Bar of Ariz.*, 433 U.S. 350, 364 (1977). For example, "[t]hat reality has great relevance in the fields of medicine and public health, where information can save lives." *Sorrell v. IMS Health Inc.*, 131 S. Ct. at 2664. In *Sorrell*, this Court struck down facially content-based regulations that disfavored pharmaceutical manufacturers by denying them access to certain prescriber-identifying information that was readily available to others. Commercial speech is typically subject to greater regulation than noncommercial speech, but even there, this Court applied heightened scrutiny.

In confusing content discrimination with viewpoint discrimination, the Ninth Circuit facilitates an end-run around the Constitution. The two concepts are distinct, but even seemingly innocuous content-based laws can too easily cross the threshold into viewpoint discrimination. Such laws "pose the inherent risk that the Government seeks not to advance a legitimate

regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion." *Turner Broadcasting*, 512 U.S. at 641.

CONCLUSION

This Court should reverse the Ninth Circuit decision.

Respectfully submitted,

James L. Hirsen
Counsel of Record
505 S. Villa Real Drive, Suite 208
Anaheim Hills, CA 92807
(714) 283-8880
james@jameshirsen.com

Deborah J. Dewart
620 E. Sabiston Drive
Swansboro, NC 28584-9674
(910) 326-4554
debcpalaw@earthlink.net

Counsel for Amicus Curiae

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
SEP 2 2 2014
OFFICE OF THE CLERK

NO. 13-502

IN THE SUPREME COURT OF THE UNITED STATES

PASTOR CLYDE REED AND GOOD NEWS COMMUNITY CHURCH,

Petitioners,

v.

TOWN OF GILBERT, ARIZONA, et. al.

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief of Amici Liberty Counsel and National Hispanic Christian Leadership Council In Support of Petitioners Seeking Reversal

Mathew D. Staver
(Counsel of Record)
Anita L. Staver
Horatio G. Mihet
P.O. Box 540774
Orlando, FL 32854
LIBERTY COUNSEL
(800) 671-1776
court@lc.org
Attorneys for Amici

Mary E. McAlister
Daniel J. Schmid
LIBERTY COUNSEL
PO Box 11108
Lynchburg, VA 24506
(800) 671-1776
court@lc.org
Attorneys for Amici

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 3

LEGAL ARGUMENT 5

I. SINCE THE EARLY DAYS OF THE REPUBLIC, THIS COURT HAS ESTABLISHED THAT LEGISLATIVE MOTIVE CANNOT BE A FACTOR IN JUDICIAL REVIEW OF LEGISLATIVE ENACTMENTS. 5

II. STRONG, ZEALOUSLY ENFORCED CONTENT-NEUTRALITY RULES FOR SPEECH-RESTRICTIVE ENACTMENTS PROVIDE BETTER PROTECTION FOR FREE SPEECH THAN DOES AN INQUIRY INTO LEGISLATIVE MOTIVE. 10

A. An Objective Standard Based Upon Whether The Government Enactment Restricts Speech Based On Its Content Provides Clearer Guidance To Courts And Litigants Than Does A Subjective Inquiry Into Motive. 10

B. This Court's Doctrines Distinguishing Between Content-Neutral and Content- and Viewpoint-

Based Restrictions More Effectively "Flush Out" Improper Motives Than Do Direct, Subjective Inquiries Into Legislative Motive. 155

C. A Strong Content Neutrality Standard Instead Of Subjective Motive Inquiry Is Particularly Appropriate For Sign Regulations Such As The Ordinance At Issue Here..... 20

III. ENGAGING IN AN INQUIRY REGARDING THE MOTIVES OF A LEGISLATIVE BODY POSES THREATS TO FOUNDATIONAL CONSTITUTIONAL PRINCIPLES. 23

A. A Subjective Inquiry Into Legislative Motive Would Violate Separation Of Powers As The Court Would Be Exceeding Its Role Of Objectively Analyzing The Validity of Legislation..... 23

B. Establishment Clause Precedent Shows That Relying Upon Motive Leads To Inconsistent Rulings And Leave Those Seeking To Follow The Law Without Reliable And Credible Direction On What Is Permitted. 30

CONCLUSION 35

TABLE OF AUTHORITIES

Cases

ACLU Nebraska Foundation v. City of Plattsmouth
419 F.3d 772 (8th Cir. 2005) 33

ACLU of Ky v. Mercer County,
432 F.3d 624 (6th Cir. 2005) 31, 32, 35

ACLU of Ky. v. Grayson County,
591 F.3d 837 (6th Cir. 2010) 31, 32

ACLU of Ky. v. McCreary County,
607 F.3d 439 (6th Cir. 2010) 31

ACLU of Ky. v. Rowan County,
513 F. Supp. 2d 889 (E.D. Ky. 2007) 31

ACLU v. Garrard County
517 F. Supp. 2d 925 (ED Ky 2007) 31

ACLU v. McCreary County,
607 F.3d 439 (6th Cir. 2010) 31, 32

ACLU v. Rutherford County,
2006 WL 2645198 (M.D. Tenn. 2006)..... 31

Am. Atheists, Inc. v. Davenport,
637 F.3d 1095 (10th Cir. 2010) 34

Atchison, Topeka & Santa Fe R. R. Co. v. Matthews, 174 U.S. 96, (1899) 25

Bailey v. Callaghan,
715 F.3d 956 (6th Cir. 2013) 8

Books v. County of Elkhart,
401 F.3d 857 (7th Cir. 2005) 31, 32

Boos v. Barry,
485 U.S. 312 (1988) 10, 11

Capitol Square Review & Advisory Board v. Pinette, 515 U.S. 753 (1995) 35

Card v. City of Everett,
520 F.3d 1009 (9th Cir. 2008) 33

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993) 25

City of Cincinnati v. Discovery Network,
507 U.S. 410 (1993) 17

City of Erie v. Pap's A.M.,
529 U.S. 277 (2000). 8

County of Allegheny v. ACLU,
492 U.S. 573 (1989) 33

Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985) 12

Edwards v. Aguillard,
482 U.S. 578 (1987) 25, 26, 28, 29

Fletcher v. Peck,
10 U.S. 87 (1810) 5, 6, 7, 28, 29

Green v. Haskell County Bd of Comm'rs,
568 F.3d 784, (10th Cir. 2009) 33

Hill v. Colorado,
530 U.S. 703 (2000) 20

Lynch v. Donnelly,
465 U.S. 668 (1984) 32

McCray v. United States,
195 U.S. 27 (1904). 6, 7, 23, 24

McCreary County v. ACLU of Ky.
545 U.S. 844 (2005), ... 31

Metromedia, Inc. v. City of San Diego,
453 U.S. 490 (1981). 21, 22

Planned Parenthood of Kansas & Mid-Missouri v. Moser, 747 F.3d 814 (10th Cir. 2014) 9

Police Department of Chicago v. Mosley,
408 U.S. 92 (1972) 18

Red River Freethinkers v. City of Fargo,
2014 WL 4178341 at *3 (8th Cir. 2014) 33

Simon & Schuster v. Members of New York State Crime Victims Board,
502 U.S. 105 (1991). 17

State of Arizona v. State of California,
283 U.S. 423 (1931) 7

Tenney v. Brandhove,
341 U.S. 367 (1951). 7, 25

Twombly v. City of Fargo,
388 F.Supp. 2d 983, (D. ND 2005) 34

United States v. Doremus,
249 U.S. 86 (1919) 6, 25

United States v. O'Brien,
391 U.S. 367 (1968) 7, 8, 26, 28, 29

United States v. Stevens,
559 U.S. 460 (2010). 17

Van Orden v. Perry,
545 U.S. 677 (2005) 33

Wallace v. Jaffree,
472 U.S. 38 (1985) 8, 30

Weber v. Freed,
239 U.S. 325 (1915) 6, 24

Weinbaum v. City of Las Cruces,
541 F. 3d 1017 (10th Cir. 2008) 34

Wisconsin Educ. Ass'n Council v. Walker,
705 F.3d 640, (7th Cir. 2013). 9

Other Authorities

Brian J. Connolly, *Environmental Aesthetics And Free Speech: Toward A Consistent Content Neutrality Standard For Outdoor Sign Regulation*, *2* MICH. J. ENVT'L. & ADMIN. L. 185, 213 (2012). 20, 21

Elena Kagan, *Private Speech, Public Purpose: The Role Of Governmental Motive In First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 451 (1996)..... 15-17, 19

Leslie Kendrick, *Content Discrimination Revisited*, 98 VA. L. REV. 231, 274-75 (2012). 18

Seth F. Kreimer, *Good Enough For Government Work: Two Cheers For Content Neutrality*, 16 JOURNAL OF CONSTITUTIONAL LAW 1261, 1303 (May 2014) 12, 13

THE FEDERALIST No. 84, at 535 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961)..... 13

INTEREST OF AMICI CURIAE[1]

Liberty Counsel is a national nonprofit litigation, education and policy organization dedicated to advancing religious freedom, the sanctity of human life and the traditional family. Liberty Counsel has offices in Florida, Virginia, California and Washington, D.C., and has hundreds of affiliate attorneys in all fifty states. A significant part of Liberty Counsel's work involves representing individuals and organizations whose First Amendment rights are threatened by or have been infringed by governmental agencies or individuals who disagree with their message.

The Ninth Circuit's use of lack of impermissible legislative motive to transform a content-based ordinance into a content-neutral regulation poses a significant threat to bedrock First Amendment freedoms. If the Ninth

---

[1] Counsel for a party did not author this Brief in whole or in part, and no such counsel or party made a monetary contribution to fund the preparation or submission of this Brief. No person or entity, other than *Amici Curiae* or their counsel made a monetary contribution to the preparation and submission of this Brief. Petitioners have filed consents to the filing of Amicus Briefs on behalf of either party or no party. Respondents' consent to the filing is being filed with this brief.

Circuit's use of legislative motive is permitted to stand, then governmental regulators will use legislative motive as a tool to disguise content-based restrictions under a veil of content neutrality.

Liberty Counsel has witnessed how legislative motive can be used to justify content and even viewpoint-based restrictions on First Amendment activity, and thereby complicate what should be a simple matter of finding that regulations aimed at restricting the content of speech are unconstitutional. Liberty Counsel has developed a body of research that will assist the Court in assessing not only the constitutionality of the Respondents' sign ordinance, but also the wide-ranging consequences of leaving the Ninth Circuit's ruling intact.

The National Hispanic Christian Leadership Conference ("NHCLC") was founded in 1995 by Reverend Samuel Rodriquez and has grown to more than 40,000 member congregations consisting of 12 to 16 million people throughout the United States. It is America's largest Hispanic Christian evangelical organization. On May 1, 2014, NHCLC merged with Conela, a Latin America-based organization that serves more than 487,000 Latin churches globally, to become NHCLC/Conela, representing more than 500,000 churches throughout the world. NHCLC's members, like the Petitioner here,

have witnessed firsthand how governmental authorities can chill churches' free speech rights under the guise of sign ordinances and similar regulations. NHCLC is concerned that the Ninth Circuit's misapplication of legislative motive to validate a content-based restriction on speech jeopardizes the free speech rights of its members and other religious organizations throughout the country. NHCLC believes that it is critical that this Court have a thorough understanding of the ramifications of the Ninth Circuit's decision.

Based upon the foregoing, Liberty Counsel and NHCLC respectfully submit this Amicus Curiae brief for the Court's consideration.

SUMMARY OF ARGUMENT

This Court has long confirmed that legislative "motive" has no place in analyzing a governmental regulation that affects free speech rights. When, as the Ninth Circuit did in this case, that tenet is violated, government officials take full advantage of the opportunity to chill free speech activities that are controversial or potentially offensive to certain community sensibilities. When it used a lack of impermissible motive to transform a content-based into a content-neutral sign ordinance, the Ninth Circuit violated centuries of precedent which holds that legislative motive has no place in free speech analysis. In so doing, it provided

governmental agencies with a potentially powerful new tool to control free speech, *i.e.* assertion of a neutral motivation.

That tool has already been in use for many years in Establishment Clause cases, with disastrous results. After decades of using legislative motive or "purpose" as an element in Establishment Clause analysis, this Court's jurisprudence remains inconsistent and confusing, leaving legislators and judges at a loss as to how to conduct governmental business without running afoul of the Establishment Clause. Indeed, this Court's Establishment Clause jurisprudence has been called "purgatory" and a "minefield."

That will be the fate of free speech jurisprudence if the Ninth Circuit's decision is upheld. Affirming the Ninth Circuit's use of legislative motive would signal to local governments that they can regulate unpopular speech so long as they can construct a sufficient veil of permissible motivation. This Court should not permit the confusion of Establishment Clause analysis to invade the free speech arena.

LEGAL ARGUMENT

I. SINCE THE EARLY DAYS OF THE REPUBLIC, THIS COURT HAS ESTABLISHED THAT LEGISLATIVE MOTIVE CANNOT BE A FACTOR IN JUDICIAL REVIEW OF LEGISLATIVE ENACTMENTS.

The Constitution was not yet 25 years old when Chief Justice Marshall established that its provisions proscribe judicial analysis of legislative motive. *Fletcher v. Peck*, 10 U.S. 87, 130-31 (1810). While acknowledging that the incursion of impure motives into legislation is deplorable, Chief Justice Marshall also said that courts should not undertake a search for such motives. *Id.* at 130.

> If the title be plainly deduced from a legislative act, which the legislature might constitutionally pass, if the act be clothed with all the requisite forms of a law, a court, sitting as a court of law, cannot sustain a suit brought by one individual against another founded on the allegation that the act is a nullity, in consequence of the impure motives which influenced certain members of the legislature which passed the law.

Id. at 131. Chief Justice Marshall outlined the uncertainties surrounding such an undertaking and concluded that courts are ill-equipped to resolve those uncertainties, particularly since it would require analysis of legislators' thoughts. *Id.* at 130.

> It may well be doubted how far the validity of a law depends upon the motives of its framers, and how far the particular inducements, operating on members of the supreme sovereign power of a state, to the formation of a contract by that power, are examinable in a court of justice.

Id.

This Court has repeatedly confirmed that legislative motive cannot be a factor in analyzing the validity of legislation. In fact in *McCray v. United States*, the Court emphatically stated that "[i]t has never been the case since the founding of the Republic that the judiciary can invalidate a law because the judge believes that it was based upon an unwise or unjust motivation." 195 U.S. 27, 53-54 (1904). In fact, "[i]t is erroneous to assume that the motive of Congress can be taken into view." *Weber v. Freed*, 239 U.S. 325, 330 (1915). *See also, United States v. Doremus*, 249 U.S. 86, 93 (1919) ("The fact that other motives may impel the exercise of federal taxing power does

not authorize the courts to inquire into that subject."); *State of Arizona v. State of California*, 283 U.S. 423, 455-56 (1931) ("Into the motives which induced members of Congress to enact the Boulder Canyon Project Act, this court may not inquire."). As the Court said in *Tenney v. Brandhove*, "[t]he holding of this Court in *Fletcher v. Peck*, 6 Cranch 87, 130, 3 L.Ed. 162, that it was not consonant with our scheme of government for a court to inquire into the motives of legislators, has remained unquestioned." 341 U.S. 367, 377-78 (1951).

The prohibition against inquiring into legislative motive extends to laws restricting First Amendment activities, such as the ordinance at issue in this case. *United States v. O'Brien*, 391 U.S. 367, 383 (1968). "It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." *Id.* "'The decisions of this court from the beginning lend no support whatever to the assumption that the judiciary may restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted.'" *Id.* (citing *McCray*, 195 U.S. at 56). In keeping with that long history, the *O'Brien* court rejected the challenger's argument that a draft-card burning prohibition was based upon illicit legislative motive. *Id.* at 384.

Similarly, this Court rejected an argument that an ordinance banning nude dancing was aimed at suppressing free expression, and refused to divine legislative motive from a statement made by a governmental official regarding "legitimate" entertainment. *City of Erie v. Pap's A.M.*, 529 U.S. 277, 292 (2000). "As we have said before, however, this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit motive." *Id.* (citing *O'Brien*, 391 U.S. at 382-83. As Justice O'Connor explained, "[i]n determining whether the government intends a moment of silence statute to convey a message of endorsement or disapproval of religion, a court has no license to psychoanalyze the legislators." *Wallace v. Jaffree*, 472 U.S. 38, 74 (1985) (O'Connor, J., concurring).

With the notable exception of the Ninth Circuit in this case, circuit courts have refused to engage in legislative psychoanalysis when determining whether a speech-restrictive enactment is constitutional. In analyzing a challenge to a picketing restriction, the Sixth Circuit cited *O'Brien* and refused the plaintiffs' request to invalidate a facially neutral statute because of a purported hidden illicit motive. *Bailey v. Callaghan*, 715 F.3d 956, 960 (6th Cir. 2013). "What the plaintiffs are left with, then, is an argument that we should look past the Act's facial neutrality as to viewpoint and

union identity, and conclude nonetheless that the Act's real purpose is to suppress speech by teachers' unions." *Id.* "But the law forecloses this kind of adventure." *Id.* Similarly, the Seventh Circuit rejected unions' requests to search for illicit motive in a facially neutral statute, citing *O'Brien* for the proposition that it could not engage in such a search. *Wisconsin Educ. Ass'n Council v. Walker*, 705 F.3d 640, 652 (7th Cir. 2013). The Tenth Circuit also rejected Planned Parenthood's request to strike down a facially neutral funding statute on the grounds that it was enacted because of hostility to the organization's pro-abortion views. *Planned Parenthood of Kansas & Mid-Missouri v. Moser*, 747 F.3d 814, 842 (10th Cir. 2014). "We reject the notion that Planned Parenthood can challenge §107(l) as an unconstitutional condition solely on the ground that its passage was motivated by a desire to penalize Planned Parenthood's protected speech and association." *Id.* at 843.

The Ninth Circuit's use of legislative motive to transform a content-based restriction into a content-neutral restriction contradicts centuries of precedent. This Court should re-affirm that legislative motive has no place in First Amendment analysis by reversing the judgment below.

II. STRONG, ZEALOUSLY ENFORCED CONTENT-NEUTRALITY RULES FOR SPEECH-RESTRICTIVE ENACTMENTS PROVIDE BETTER PROTECTION FOR FREE SPEECH THAN DOES AN INQUIRY INTO LEGISLATIVE MOTIVE.

A. An Objective Standard Based Upon Whether The Government Enactment Restricts Speech Based On Its Content Provides Clearer Guidance To Courts And Litigants Than Does A Subjective Inquiry Into Motive.

This Court has rejected legislative motive inquiry in First Amendment challenges not only because such inquiries are subjective and uncertain, but also because the Court's traditional focus on content neutrality provides more clarity for legislators drafting statutes and courts analyzing them. *Boos v. Barry*, 485 U.S. 312, 335–36 (1988) (Brennan, J., concurring in part and concurring in judgment). "The traditional approach sets forth a bright-line rule: any restriction on speech, the application of which turns on the content of the speech, is a content-based restriction regardless

of the motivation that lies behind it." *Id.* "That, to my mind, has always been implicit in the fact that we term the test a 'content-based' test rather than a 'motivation-based' test." *Id.* at 336. "The traditional rule thus provides clear guidance. Governments can ascertain the scope of impermissible regulation. Individuals can ascertain the scope of their constitutional protection." *Id.* By contrast, analysis of purpose, "plunges courts into the morass of legislative motive, a notoriously hazardous and indeterminate inquiry." *Id.*

> Although an inquiry into motive is sometimes a useful supplement, the best protection against governmental attempts to squelch opposition has never lain in our ability to assess the purity of legislative motive but rather in the requirement that the government act through content-neutral means that restrict expression the government favors as well as expression it disfavors.

Id at 336-37.

In an earlier discussion of the centrality of content neutrality, Justice Brennan explained that:

> When we deal with the complex of strands in the web of freedoms which make up free speech, the operation and effect of the method by which speech is sought to be restrained must be subjected to close analysis and critical judgment in the light of the particular circumstances to which it is applied. This general proscription against unnecessarily broad content-based regulation permeates First Amendment jurisprudence.

Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 778–79 (1985) (Brennan, J., dissenting). The prohibition against content-based regulations is ubiquitous because, "[i]n its strong form, the doctrine functions to minimize interferences with free speech that reflect and establish pernicious habits of censorship and silence."[2] Content neutrality "frames the terms of engagement between the governed and the governors of the United States in ways that incline the 'general spirit of the people and of the government' to the protection of rights of free expression," as

---

[2] Seth F. Kreimer, *Good Enough For Government Work: Two Cheers For Content Neutrality*, 16 JOURNAL OF CONSTITUTIONAL LAW 1261, 1303 (May 2014).

advocated by Alexander Hamilton.[3] "Strong content neutrality requirements better impart, cultivate, and enforce this inclination than the competing frameworks of either 'ferreting out' intolerant government motives or adjuring government to limit its censorship to 'proportionate' means."[4]

Unlike the uncertain footing provided by a search for illicit legislative motive, a strong content neutrality standard provides a firm foundation based upon "a system of norms which preserve the reality of free expression in American society."[5] When content neutrality is paired with prohibitions against vagueness and unbridled discretion, it creates a system of clear, broadly applicable ex ante rules. These rules help detach legislative decision making from circumstances that can lead to "intolerant suppression of speech."[6]

> The question of whether a particular rule is "content neutral" is not one that requires either a street level bureaucrat or a reviewing court to attend to the

---

3 *Id.* at 1264 (citing THE FEDERALIST No. 84, at 535 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961).

4 *Id.* at 1277.

5 *Id.* at 1276.

6 *Id.* at 1317-18.

> attractive or repellant qualities of the speech in question. Studies show tolerance is more difficult to maintain under pressure; ex ante decision making is less likely to take place under conditions of threat and anxiety. Likewise "sober second thoughts" can dilute intolerance generated by outrage, and the requirement of adopting ex ante general rules that potentially impact a range of cases has a tendency to induce such a mindset.[7]

In other words, for citizens, legislators and courts, "it is more straightforward and robust to discern whether a rule distinguishes on the basis of content" than to try to determine whether a regulation is based upon illicit motives.[8] The Ninth Circuit's circumvention of the ubiquitous and effective content neutrality doctrine contradicts precedent and, if permitted to stand, will create the kind of environment that can lead to suppression of speech.

---

7 *Id.* at 1319.

8 *Id.* at 1320.

B. This Court's Doctrines Distinguishing Between Content-Neutral and Content- and Viewpoint-Based Restrictions More Effectively "Flush Out" Improper Motives Than Do Direct, Subjective Inquiries Into Legislative Motive.

This Court's content neutrality doctrine not only provides legislators, citizens and courts with bright-line *ex ante* rules for legislative analysis, but also provides a more effective mechanism for ferreting out impermissible bias than does an inquiry into legislative motivation. As Justice (then-Professor) Kagan explained, "the distinction between content-based and content-neutral action–more specifically, the distinction among viewpoint-based, other content-based, and content-neutral action–facilitates the effort to flush out improper purposes" by separating out, "roughly but readily, actions with varying probabilities of arising from illicit motives."[9]

---

[9] Elena Kagan, *Private Speech, Public Purpose: The Role Of Governmental Motive In First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 451 (1996).

For example, an ordinance restricting all signs regardless of content is unlikely to be based upon illicit motives or ideological biases.[10] Since the restriction applies to all ideas, a legislator's affirmative vote will probably not be based upon hostility or sympathy to particular messages.[11] By contrast, if an ordinance applies differential restrictions based upon the content of the sign–such as is the case here–"a legislator's view as to the merits of particular ideas–the idea restricted and its competitors–will intrude, whether consciously or not, on the decision whether the harms caused by the speech justify the regulation."[12] In other words, a statute that is found to be content- or viewpoint-based will likely be infected with an improper purpose.[13]

Consequently, distinctions between viewpoint-based, content-based and content-neutral laws create "a set of presumptive conclusions about when improper motive has tainted a restriction on speech."[14] Legislators might on occasion be able to mask improper motive in content-neutrality or convince a court that viewpoint-based laws are not founded on improper motives. However, the occasional

---

10 *Id.*

11 *Id.*

12 *Id.*

13 *Id.*

14 *Id.* at 452-53.

mistakes that might arise from the objective content-neutrality analysis are preferable to more frequent errors, and the collateral damage to constitutional principles (see below) that would arise from a subjective inquiry into legislative motive.[15] "If the facial markers we use are not perfect, they are better than what they replace."[16]

This Court's cases show that the chances of a legislature convincing the Court that a viewpoint-based restriction is based upon a permissible state interest are very slim. In *United States v. Stevens*, 559 U.S. 460, 468 (2010), the Court rejected the state's argument that the law was constitutional because it prohibited a form of expression that, like obscenity, should be excluded from First Amendment protection. *Id.* In *City of Cincinnati v. Discovery Network*, the city's aesthetic justification for banning newsracks for commercial handbills did not render content neutral a policy which on its face distinguished commercial publications from other publications. 507 U.S. 410, 429 (1993). This Court also found that New York's "Son of Sam law" requiring that revenues from criminals' chronicles of their crimes be set aside for victims was not rendered content neutral by the government's justification that criminals

---

15 *Id.* at 453.

16 *Id.*

should not profit by their own wrongs. *Simon & Schuster v. Members of New York State Crime Victims Board*, 502 U.S. 105, 116, 119 (1991). Similarly, this Court rejected Chicago's arguably neutral rationale for exempting labor pickets from restrictions, *i.e.*, that they were less likely to be violent and require city oversight. *Police Department of Chicago v. Mosley*, 408 U.S. 92, 99 (1972). This Court struck down the picketing restrictions as impermissibly content-based. *Id.* In each of these cases, the governmental agencies attempted to use absence of impermissible legislative motive to justify a non-neutral law, just as the Town of Gilbert is doing here. In each case, this Court refused to substitute its objective content-neutrality test for a subjective inquiry into legislative motive, showing the effectiveness of relying upon existing content neutrality standards to ferret out impermissible motives.

As Professor Leslie Kendrick stated, "[s]ubject-matter and viewpoint classifications have such a high probability of concealing an illicit purpose that one may confidently infer such a purpose from the fact of the classification."[17] Furthermore, regardless of whether they strongly correlate with illicit motives, "such classifications are a wrong in

---

[17] Leslie Kendrick, *Content Discrimination Revisited*, 98 VA. L. REV. 231, 274-75 (2012).

and of themselves" ... and "do some sort of expressive harm by signaling that the government countenances the classification of speakers by their ideas."[18]

As Justice Kagan noted, this Court's established doctrine of treating as suspect seemingly content-neutral laws that 1) confer standard-less discretion on administrative officials; 2) turn on the communicative effect of speech and 3) attempt to "equalize" the speech market, "offers further protection against impermissible motive without having to engage in subjective inquiry into legislators' thoughts."[19]

The Ninth Circuit's conclusion that the city's facially content-based sign ordinance is constitutional because of the absence of impermissible motive departs from established precedent that legislative motive is irrelevant to the determination of whether an ordinance violates free speech. The decision should, therefore, be reversed.

---

18 *Id.*

19 Kagan, *Private Speech,* at 453.

C. A Strong Content Neutrality Standard Instead Of Subjective Motive Inquiry Is Particularly Appropriate For Sign Regulations Such As The Ordinance At Issue Here.

Content-based ordinances such as the one at issue here are particularly suspect when they seek to regulate signs, offering further evidence that the Ninth Circuit has departed from established authority. Unlike oral communication such as picketing and leafleting, which require interaction with others, signs are entirely passive speech that do not require any action by the viewer. The Court might tolerate regulations that affect the content of oral communication when it believes it is necessary to protect the privacy rights of speech recipients. *See e.g., Hill v. Colorado*, 530 U.S. 703, 723-24 (2000) (upholding as content-neutral a statute banning pro-life speakers from approaching within eight feet of individuals receiving medical treatment, including abortions, outside abortion clinics.).

However, in the case of a sign, there are no speech recipients whose privacy rights would be affected by interaction with a

speaker.[20] "There is almost no conceivable situation in which a sign affixed to the ground and regulated by a municipal sign ordinance could possibly infringe upon an individual's privacy interest in a fashion similar to that of an oral protester who knowingly approaches within close range of another person."[21]

Instead of protecting a right of privacy for speech recipients, "the interest being protected counter to the sign owner's First Amendment right is a public interest in traffic safety and environmental aesthetics."[22] That being the case, regulation of the physical characteristics of signs "offer a much more definite and content-neutral basis on which an enforcement official can enforce the sign ordinance" to protect traffic and aesthetic interests.[23]

In a foundational case on sign regulations, this Court articulated the dangers posed by governmental discretion and the necessity of stringent content neutrality standards. *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 515-17 (1981). In

---

20 *See* Brian J. Connolly, *Environmental Aesthetics And Free Speech: Toward A Consistent Content Neutrality Standard For Outdoor Sign Regulation*, *2* MICH. J. ENVT'L. & ADMIN. L. 185, 213 (2012).

21 *Id.* at 213-14.

22 *Id.* at 214.

23 *Id.*

Metromedia, this Court struck down a sign ordinance similar to the ordinance in this case as impermissibly content-based. *Id.* The Court stated that an ordinance which permitted some kinds of billboards could not be categorized as a reasonable time, place and manner restriction because it regulated on the basis of content. *Id.* at 515. The dangers inherent in such content-based restrictions are that they would grant government the power to choose permissible subjects for public debate and the control over the search for political truth, *i.e.*, it would permit the biases and motivations of governmental officials to be used to regulate speech. *See id.* at 515-16. Strict content-neutrality analysis, therefore, protects the state's asserted interest in safety and aesthetics in a manner that also shields speech regulations from illicit motives. *See id.*

Consequently, in a case such as this involving regulation of signs, the physical characteristics of the signs is the relevant factor and should be the only focus of the free speech analysis. Grafting legislative purpose into the analysis to try to "save" a content-based regulation, as the Ninth Circuit did here, is particularly inappropriate in the context of regulation of signs.

III. ENGAGING IN AN INQUIRY REGARDING THE MOTIVES OF A LEGISLATIVE BODY POSES THREATS TO FOUNDATIONAL CONSTITUTIONAL PRINCIPLES.

A. A Subjective Inquiry Into Legislative Motive Would Violate Separation Of Powers As The Court Would Be Exceeding Its Role Of Objectively Analyzing The Validity of Legislation.

Under Article III of the Constitution, "the judicial department of the government is charged with the solemn duty of enforcing the Constitution." *McCray v. United States*, 195 U.S. 27, 53 (1904). That duty requires, in some cases, that the court determine whether the legislature or executive branch has exceeded its enumerated powers. *Id.* at 54. However, "no instance is afforded from the foundation of the government where an act which was within a power conferred, was declared to be repugnant to the Constitution, because it appeared to the judicial mind that the particular exertion of constitutional power was either unwise or unjust." *Id.* "To announce such a principle would amount to declaring that, in our constitutional system, the judiciary was not only charged with the duty of upholding the

Constitution, but also with the responsibility of correcting every possible abuse arising from the exercise by the other departments of their conceded authority." *Id.* That, it turn, would be an act of judicial usurpation that would overthrow "the entire distinction between the legislative, judicial, and executive departments of the government, upon which our system is founded." *Id.*

Furthermore, curing the abuse of power by one branch of government through the abuse of power of another branch "would destroy all distinction between the powers of the respective departments of the government, would put an end to that confidence and respect for each other which it was the purpose of the Constitution to uphold, and would thus be full of danger to the permanence of our institutions." *Id.* at 54-55. "The decisions of this court from the beginning lend no support whatever to the assumption that the judiciary may restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted." *Id.* at 55. *See also, Weber v. Freed*, 239 U.S. 325, 330 (1915) ("The proposition plainly is wanting in merit, since it rests upon the erroneous assumption that the motive of Congress in exerting its plenary power may be taken into view for the purpose of refusing to give effect to such power when exercised."); *United States v. Doremus*, 249 U.S. 86, 93 (1919)(from an early

day the court has held that the fact that other motives may impel the exercise of federal taxing power does not authorize the courts to inquire into that subject); *Tenney v. Brandhove*, 341 U.S. 367, 378 (1951) ("The courts should not go beyond the narrow confines of determining that a committee's inquiry may fairly be deemed within its province."); *Atchison, Topeka & Santa Fe R. R. Co. v. Matthews*, 174 U.S. 96, 102-103 (1899)("[A]s a court, we may not interpose our personal views as to the wisdom or policy of either form of legislation.").

Trying to discern legislative motive is not only a threat to separation of powers, but is also a virtually impossible task. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 558-59 (1993) (Scalia J., concurring in part and concurring in the judgment); *Edwards v. Aguillard*, 482 U.S. 578, 636 (1987) (Scalia, J. dissenting). As Justice Scalia explained, the number of possible motivations is not binary or even finite. *Edwards,* 482 U.S. at 636. "To look for the sole purpose of even a single legislator is probably to look for something that does not exist." *Id.* at 637. Even if the Court were to undertake the task, "where ought we to look for the individual legislator's purpose?" *Id.*

> We cannot of course assume that every member present (if, as is unlikely, we know who or even how

> many they were) agreed with the motivation expressed in a particular legislator's pre-enactment floor or committee statement. Quite obviously, "[w]hat motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it." *United States v. O'Brien*, 391 U.S. 367, 384, 88 S.Ct. 1673, 1683, 20 L.Ed.2d 672 (1968). Can we assume, then, that they all agree with the motivation expressed in the staff-prepared committee reports they might have read–even though we are unwilling to assume that they agreed with the motivation expressed in the very statute that they voted for? Should we consider post-enactment floor statements? Or post-enactment testimony from legislators, obtained expressly for the lawsuit? Should we consider media reports on the realities of the legislative bargaining?

Id. at 637-38. "All of these sources, of course, are eminently manipulable." *Id.* at 638. "Legislative histories can be contrived and sanitized, favorable media coverage orchestrated, and post-enactment recollections

conveniently distorted." *Id.* "Perhaps most valuable of all would be more objective indications–for example, evidence regarding the individual legislators' religious affiliations. And if that, why not evidence regarding the fervor or tepidity of their beliefs?" *Id.*

Even if the Court were able to assess what individual legislators intended, it would still have to wrestle with the question of "how many of them must have the invalidating intent." *Id.* at 638.

> If a state senate approves a bill by vote of 26 to 25, and only one of the 26 intended solely to advance religion, is the law unconstitutional? What if 13 of the 26 had that intent? What if 3 of the 26 had the impermissible intent, but 3 of the 25 voting against the bill were motivated by religious hostility or were simply attempting to "balance" the votes of their impermissibly motivated colleagues? Or is it possible that the intent of the bill's sponsor is alone enough to invalidate it—on a theory, perhaps, that even though everyone else's intent was pure, what they produced was the fruit of a forbidden tree?

Id. "Because there are no good answers to these questions," this Court has recognized from *Fletcher v. Peck*, 10 U.S. at 130 to *United States v. O'Brien*, 391 U.S. at 383–84, "that determining the subjective intent of legislators is a perilous enterprise." *Id.*

Indeed Chief Justice Marshall enumerated the perils of a subjective inquiry into motive more than 100 years before Justice Scalia:

> Must it be direct corruption, or would interest or undue influence of any kind be sufficient? Must the vitiating cause operate on a majority, or on what number of the members? Would the act be null, whatever might be the wish of the nation, or would its obligation or nullity depend upon the public sentiment? If the majority of the legislature be corrupted, it may well be doubted, whether it be within the province of the judiciary to control their conduct, and, if less than a majority act from impure motives, the principle by which judicial interference would be regulated, is not clearly discerned.

Fletcher v. Peck, 10 U.S. at 130. Similarly in *O'Brien*, the Court said:

> What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork. We decline to void essentially on the ground that it is unwise legislation which Congress had the undoubted power to enact and which could be reenacted in its exact form if the same or another legislator made a 'wiser' speech about it.

O'Brien, 391 U.S at 384.

As Justice Scalia stated, the perils of trying to discern and apply legislative motivation affect not only judges who might reach the wrong conclusion, but also legislators. *Edwards*, 482 U.S. at 638-39. Lawmakers would "find that they must assess the validity of proposed legislation—and risk the condemnation of having voted for an unconstitutional measure—not on the basis of what the legislation contains, nor even on the basis of what they themselves intend, but on the basis of what others have in mind." *Id.* at 639. This is precisely the kind of legislative psychoanalysis that this Court has cautioned against. *Wallace v. Jaffree*, 472 U.S. 38, 74 (1985) (O'Connor, J., concurring).

The Ninth Circuit improperly embarked on the perilous journey of discerning legislative motive. This Court should halt that excursion and return it to the path of objective content neutrality.

B. Establishment Clause Precedent Shows That Relying Upon Motive Leads To Inconsistent Rulings And Leave Those Seeking To Follow The Law Without Reliable And Credible Direction On What Is Permitted.

The perils of utilizing legislative motive in free speech analysis are cogently illustrated in several Establishment Clause decisions where attempts to discern impermissible religious motives led to contradictory rulings that left legislators and judges hopelessly entangled in a web of confusion. Of particular note are cases addressing displays of the Ten Commandments in which identical historical document displays featuring the Decalogue were found to be both constitutional and unconstitutional within the same circuit, based upon a perception of impermissible legislative motive. *Compare ACLU of Ky. v. Grayson County*, 591 F.3d 837 (6th Cir. 2010) (upholding a Foundations of American Law and

Government display including the Decalogue), *ACLU of Ky v. Mercer County*, 432 F.3d 624 (6th Cir. 2005) (same), *ACLU of Ky. v. Rowan County*, 513 F. Supp. 2d 889, 897 (E.D. Ky. 2007) (same), *ACLU v. Garrard County* 517 F. Supp. 2d 925 (ED Ky 2007) (finding disputed facts regarding the purpose and effect of the Foundations Display), *ACLU v. Rutherford County*, 2006 WL 2645198 (M.D. Tenn. 2006) (denying a permanent injunction against the Foundations Display) *with ACLU of Ky. v. McCreary County*, 607 F.3d 439, 449 (6th Cir. 2010) (finding the identical display unconstitutional). Other circuit courts analyzing the identical display likewise reached conflicting conclusions. *See e.g., Books v. County of Elkhart*, 401 F.3d 857, 866 (7th Cir. 2005) (upholding a Foundations display).

The inconsistent rulings followed this Court's determination in *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 873-74 (2005), that a county's past decision to post a framed copy of the Decalogue in the courthouse evinced an improper religious motive that continued to "taint" the later integrated "Foundations" display. The Court eschewed a "once tainted always tainted" approach, stating that integrated historical displays which include the Ten Commandments can withstand Establishment Clause challenges. *Id.* at 874. However, the Court did not provide objective standards to determine when impermissible

religious motives would become irrelevant. *Id.* Absent those standards, the Sixth Circuit on remand concluded that the religious "taint" remained even after the passage of more than 10 years, a complete change in county personnel and new legislative resolutions affirming the historical purpose of the displays. *ACLU v. McCreary County*, 607 F.3d 439, 449 (6th Cir. 2010). However, other panels of the same circuit reviewing identical displays concluded that impermissible religious motivation was not present and the displays were constitutional. *Grayson County*, 591 F.3d at 853; *Mercer County*, 432 F.3d at 630. Similarly, the Seventh Circuit did not find impermissible religious motivation and concluded that an identical display in Indiana was constitutional. *Books*, 401 F.3d at 866.

Utilizing subjective review of legislative motive has yielded equally inconsistent results in Establishment Clause challenges of public Christmas displays, stand-alone Decalogue monuments and similar government acknowledgements of religion. Trying to discern whether such public displays are "tainted" with improper religious motives has led to fractured and inconsistent decisions. *Compare, Lynch v. Donnelly*, 465 U.S. 668 (1984) (finding a display of a crèche along with a Christmas tree, Santa house and other objects was constitutional), *with County of Allegheny v. ACLU*, 492 U.S. 573 (1989) (a public display of a menorah and

Christmas tree outside a courthouse was constitutional, but a display of a crèche inside was not).

The confusion caused by subjective inquiry into legislative motive is perhaps best illustrated by the fact that on the same day that it declared an integrated historical display containing the Decalogue unconstitutional, this Court concluded that a stand-alone granite Ten Commandments monument was not infused with impermissible motive and therefore did not violate the Establishment Clause. *Van Orden v. Perry*, 545 U.S. 677 (2005). Circuit courts have found similar stand-alone monuments both constitutional and unconstitutional based upon differential views of the underlying legislative motive. *Compare ACLU Nebraska Foundation v. City of Plattsmouth*. 419 F.3d 772 (8th Cir. 2005) (en banc) (finding no impermissible motive), *Red River Freethinkers v. City of Fargo*, 2014 WL 4178341 at *3 (8th Cir. 2014) (Ten Commandments monument placed on City-owned land did not evince impermissible motive to violate Establishment Clause), *Card v. City of Everett*, 520 F.3d 1009 (9th Cir. 2008) (same) *with Green v. Haskell County Bd of Comm'rs*, 568 F.3d 784, (10th Cir. 2009), *reh'g en banc denied*, 574 F.3d 1235 (10th Cir. 2009) (finding a concrete Ten Commandments monument was infused with impermissible motive and thus unconstitutional). *See also,*

Twombly v. City of Fargo, 388 F.Supp. 2d 983, 986-990 (D. ND 2005) (applying *Van Orden* to validate a concrete Ten Commandments monument).

Public acknowledgements of religion, such as symbols on roadsides or on municipal property, have similarly been alternatively declared constitutional or unconstitutional depending upon the courts' determination regarding the presence of impermissible motive. *Compare Weinbaum v. City of Las Cruces*, 541 F. 3d 1017, 1033-1034 (10th Cir. 2008) (finding that the pictograph of three crosses, including one cross that was larger than the others on a city seal did not evince a "predominant religious purpose" because it related to the name of the city, Las Cruces, meaning, the crosses, which in turn, was reflective of secular historical events) *with Am. Atheists, Inc. v. Davenport*, 637 F.3d 1095 (10th Cir. 2010) (finding that roadside memorial crosses had effect of endorsing Christianity in violation of the Establishment Clause). As Justice Scalia has observed, the infusion of legislative motive into analysis of Establishment Clause challenges has led to "invited chaos" and created a "minefield" for legislatures trying to craft constitutionally valid statutes. *Capitol Square Review & Advisory Board v. Pinette*, 515 U.S. 753, 768 n.3 (1995). One Circuit Court judge has called the motive-laden Establishment Clause

jurisprudence "purgatory." *Mercer County* 432 F.3d at 636.

The Ninth Circuit's use of legislative motive (or absence thereof) to determine content neutrality threatens to create a similar minefield for free speech regulations. This Court should not let the "chaos" caused by the subjective inquiry into legislative motive in Establishment Clause jurisprudence to take hold in the free speech arena. This Court should overturn the Ninth Circuit's decision, and should confirm that the objective content neutrality analysis which has been in place since the founding of the Republic remains the standard for free speech challenges.

CONCLUSION

The Ninth Circuit's use of legislative motive to transform a content-based regulation into a content-neutral ordinance contradicts established precedent. It also opens a virtual Pandora's Box of confusion and chaos as exemplified in the fractured and inconsistent Establishment Clause rulings.

This Court should reject the Ninth Circuit's attempt to graft subjective inquiry into legislative motive on the objective content-

neutrality analysis utilized for free speech challenges.

September 2014.

Mathew D. Staver
(Counsel of Record)
Anita L. Staver
Horatio G. Mihet
LIBERTY COUNSEL
P.O. Box 540774
Orlando, FL 32854
(800) 671-1776
court@lc.org
Attorneys for
Amici

Mary E. McAlister
Daniel J. Schmid
LIBERTY COUNSEL
PO Box 11108
Lynchburg, VA 24506
(800) 671-1776
court@lc.org
Attorneys for
Amici

AMICUS CURIAE BRIEF

No. 13-502

IN THE

Supreme Court of the United States

Supreme Court, U.S.
FILED
NOV 21 2014
OFFICE OF THE CLERK

CLYDE REED, *et al.*,
Petitioners,

v.

TOWN OF GILBERT, ARIZONA, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE NATIONAL LEAGUE OF CITIES, UNITED STATES CONFERENCE OF MAYORS, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, AMERICAN PLANNING ASSOCIATION, AND SCENIC AMERICA, INC. AS AMICI CURIAE IN SUPPORT OF RESPONDENT

LISA SORONEN
Executive Director
STATE & LOCAL LEGAL CENTER
444 North Capitol St. NW
Suite 515
Washington, DC 20001

RANDAL R. MORRISON
SABINE & MORRISON
PO Box 531518
San Diego CA 92153-1518
(619) 234-2864

WILLIAM D. BRINTON
Counsel of Record
ROGERS TOWERS, P.A.
1301 Riverplace Boulevard
Suite 1500
Jacksonville, FL 32207
(904) 398-3911
wbrinton@rtlaw.com

SUSAN L. TREVARTHEN, FAICP
WEISS SEROTA HELFMAN COLE BIERMAN & POPOK, PL
200 E. Broward Boulevard
Suite 1900
Fort Lauderdale, FL 33301
(954) 763-4242

Counsel for Amici Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF AMICI CURIAE	1
INTRODUCTION	3
SUMMARY OF ARGUMENT	3
ARGUMENT	5
I. COMPREHENSIVE SIGN REGULATIONS IN GENERAL	5
A. Exemptions and Exceptions	9
B. Prohibited Sign Types	10
C. Regulated Signs	11
D. Warning Signs (Temporary and Permanent)	14
E. Permitting for Allowed Sign Types	15
F. Sign Codes Vary	17
G. Role of Content in Sign Regulations	17
II. READING A SIGN TO DETERMINE ITS CATEGORY DOES NOT MAKE THE REGULATION "CONTENT-BASED"	18
III. GILBERT'S PROVISION FOR TEMPORARY DIRECTIONAL SIGNS IS "CONTENT-NEUTRAL" ON ITS FACE	22
IV. GILBERT'S PROVISION FOR POLITICAL SIGNS (TEMPORARY ELECTION SIGNS) IS "CONTENT-NEUTRAL" ON ITS FACE	25

TABLE OF CONTENTS—Continued

Page

V. GILBERT'S PROVISION FOR IDEOLOGICAL SIGNS (FREE EXPRESSION SIGNS) IS "CONTENT-NEUTRAL" ON ITS FACE 26

VI. GILBERT'S SIGN REGULATIONS FOR TEMPORARY DIRECTIONAL SIGNS RELATING TO A QUALIFYING EVENT REMAIN "CONTENT-NEUTRAL" WHEN COMPARED WITH POLITICAL SIGNS AND IDEOLOGICAL SIGNS 29

CONCLUSION 32

TABLE OF AUTHORITIES

CASES — Page(s)

Arlington County Repub. Comm. v. Arlington County, 983 F.2d 587 (4th Cir. 1993) 6, 25, 26

Berman v. Parker, 348 U.S. 26 (1954) 6

Brayton v. City of New Brighton, 519 N.W.2d 243 (Minn. Ct. App. 1994), *cert. denied*, 514 U.S. 1036 (1995) 28

Brown v. Town of Cary, 706 F.3d 294 (4th Cir. 2013) 28, 29, 30

Burson v. Freeman, 504 U.S. 191 (1992) 25, 26

Chapin Furniture Outlet, Inc. v. Town of Chapin, 2006 U.S. Dist. LEXIS 72483, 2006 WL 2711851 (D. S.C. Sept. 20, 2006), *vacated on other grounds by Chapin Furniture Outlet, Inc. v. Town of Chapin*, 252 Fed. Appx. 566, 2007 U.S. App. LEXIS 25378, 2007 WL 3193854 (4th Cir. 2007) 7

Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876 (2010) 25

City of Ladue v. Gilleo, 512 U.S. 43 (1994) 5, 12

City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425 (2002) 6

Clear Channel Outdoor, Inc. v. City of Los Angeles, 340 F.3d 810 (9th Cir. 2003) 10

TABLE OF AUTHORITIES—Continued

Page(s)

Consol. Edison Co. of N.Y., Inc. v. Pub. Serv. Comm'n, 447 U.S. 530 (1980) 21

Covenant Media of S.C., LLC v. City of N. Charleston, 493 F.3d 421 (2007), *cert. denied*, 552 U.S. 1100 (2008) 30

Covenant Media of S.C., LLC v. Town of Surfside Beach, 321 Fed. Appx. 251 (4th Cir. 2009) 6

Dimas v. City of Warren, 939 F. Supp. 554 (E.D. Mich. 1996) 25

Dodd v. Hood River County, 136 F.3d 1219 (9th Cir. 1998) 20

Eu v. San Francisco County Democratic Central Comm., 489 U.S. 214 (1989) 25

FCC v. League of Women Voters of Cal., 468 U.S. 364 (1984) 21

G.K. Ltd. Travel v. Lake Oswego, 436 F.3d 1064 (9th Cir. 2006), *cert. denied*, 549 U.S. 822 (2006) 30

Giovani Carandola Ltd v. Bason, 303 F.3d 507 (4th Cir. 2002) 30

TABLE OF AUTHORITIES—Continued

Page(s)

Granite State Outdoor Advertising, Inc. v. City of Clearwater, 213 F. Supp. 2d 1312 (M.D. Fla. 2002), *aff'd in part and rev'd in part on other grounds*, 351 F.3d 1112 (11th Cir. 2003), *cert. denied*, 543 U.S. 813 (2004)..... 15, 18, 30

Granite State Outdoor Advertising, Inc. v. City of St. Petersburg, Fla., No. 8:01–cv–2250–T–30MSS2, 2002 WL 34558956 (M.D. Fla. Oct. 18, 2002), *aff'd in part and rev'd in part*, 348 F.3d 1278 (11th Cir. 2003), *cert. denied*, 541 U.S. 1086 (2004)..... 30

H.D.V.-Greektown, LLC v. City of Detroit, 568 F.3d 609, 620-25 (6th Cir. 2009)..... 29

Herson v. San Carlos, 714 F. Supp. 2d 1018 (N.D. Cal. 2010), *aff'd*, 433 Fed. Appx. 569 (9th Cir. 2011).. 27

Hill v. Colorado, 530 U.S. 703 (2000)..... 31

Kovacs v. Cooper, 336 U.S. 77 (1949)..... 6

Linmark Associates, Inc. v. Willingboro, 431 U. S. 85 (1977)..... 12

McCullen v. Coakley, 134 S. Ct. 2518 (2014)..... 31

McIntyre v. Ohio Elections Comm'n, 514 U.S. 334 (1995)..... 26

TABLE OF AUTHORITIES—Continued

Page(s)

Melrose, Inc. v. City of Pittsburgh,
613 F.3d 380 (3d Cir. 2010), *cert. denied*,
131 S. Ct. 1008 (2011) 30

Members of the City Council of Los Angeles v. Taxpayers for Vincent,
466 U.S. 789 (1984) ..... *passim*

Messer v. City of Douglasville,
975 F.2d 1505 (11th Cir. 1992) 10

Metromedia, Inc. v. City of San Diego,
453 U.S. 490 (*1981*) ..... *passim*

Monitor Patriot Co. v. Roy,
401 U.S. 265 (1971) 25

Naser Jewelers, Inc. v. City of Concord,
513 F.3d 27 (1st Cir. 2008) 7

National Advertising Co. v. City of Miami, Florida,
287 F. Supp. 2d 1349 (S.D. Fla. 2003), *rev'd on other grounds*, 402 F.3d 1329 (11th Cir. 2005), *cert. denied*, 546 U.S. 1170 (2006) 20

Neighborhood Enters., Inc. v. City of St. Louis,
644 F.3d 728 (8th Cir. 2011) 29

Police Dep't of Chicago v. Mosley,
408 U.S. 92 (1972) 21, 31

Reed v. Gilbert,
707 F.3d 1057 (9th Cir. 2013) 24

TABLE OF AUTHORITIES—Continued

Page(s)

Scadron v. City of Des Plaines, 734 F. Supp. 1437 (N.D. Ill. 1990), *aff'd*, 989 F.2d 502 (7th Cir. 1993) 29

Serv. Emps. Int'l Union, Local 5 v. City of Houston, 595 F.3d 588 (5th Cir. 2010) 29

Simon & Schuster, Inc. v. Members of State Crime Victims Bd., 502 U.S. 105 (1991) 21

Solantic, LLC v. City of Neptune Beach, 410 F.3d 1250 (11th Cir. 2005) 29

St. Louis Poster Advertising Co. v. City of St. Louis, 249 U.S. 269 (1919) 11

Thomas v. Chicago Park Dist., 534 U.S. 316 (2002) 20, 21

Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622 (1994) 21

Wag More Dogs v. Cozart, 680 F.3d 359 (4th Cir. Va. 2012) 19

Ward v. Rock Against Racism, 491 U.S. 781 (1989) 6, 21, 31

Wheeler v. Commissioner of Highways, 822 F.2d 586 (6th Cir. 1987), *cert. denied*, 484 U.S. 1007 (1988), *reh'g denied*, 485 U.S. 944 (1988) 10

TABLE OF AUTHORITIES—Continued

CONSTITUTION Page(s)

U.S. Const. amend. I ..... *passim*

STATUTES AND REGULATIONS

ARIZ. REV. STAT. § 16-1019 (2011) 26

GILBERT SIGN CODE § 4.401 6

GILBERT SIGN CODE § 4.402.I 26

GILBERT SIGN CODE § 4.402.J 27

GILBERT SIGN CODE § 4.402.P 22

COURT FILINGS

Affidavit of Ethel D. Hammer, *Granite State Outdoor Adv. Inc. v. City of Clearwater*, No. 8:01-cv-01663-JSM (M.D. Fla.) (April 11, 2002) 8

OTHER AUTHORITIES

AMERICAN PLANNING ASSOCIATION, POLICY GUIDE ON BILLBOARD CONTROLS (Apr. 1997), http://www.planning.org/policy/guides/adopted/billboards.htm 11

AMERICAN SOCIETY OF LANDSCAPE ARCHITECTS, BILLBOARDS AND SIGNAGE (2010), http://www.asla.org/uploadedFiles/CMS/Government_Affairs/Public_Policies/Billboards.pdf 11

Christopher J. Duerkson & Matthew R. Goebel, *Billboards, Signs, and Newsboxes*, *in* AESTHETICS, COMMUNITY CHARACTER, AND THE LAW (2000) 2

TABLE OF AUTHORITIES—Continued

Page(s)

Ben Forer, *Get Your Mortgage Paid by Turning Your House into a Billboard*, ABC NEWS BUSINESS BLOG (Feb 29, 2012, 4:33 PM), http:// abcnews.go.com/ blogs/business/2012/02/get-your-mortga ge-paid-for-by-turning-your-house-into- a-billboard/ 7-8

Jules B. Gerard, *Evolving Voices in Land Use Law: A Festschrift in Honor of Daniel R. Mandelker: Part III: Zoning Aesthetics: Chapter 5: The Takings Clause and Signs: Election Signs and Time Limits*, 3 WASH. U. J.L. & POL'Y 379 (2000)..... 12

Gilbert, Arizona, WIKIPEDIA, http://en.wiki pedia.org/wiki/Gilbert,_Arizona (last visited Nov. 11, 2014) 26

DANIEL MANDELKER, ET AL., STREET GRAPHICS AND THE LAW (2004), *available at* https://www.planning.org/pas/reports/ subscriber/archive/pdf/PAS_527.pdf 2

Sue Pekarek, *Home Mortgage Assistance from Braniacs from Mars*, HOUSEKA- BOODLE (Oct. 26, 2012), ttp://www.house kaboodle.com/home-mortgage-assistance -from-brainiacs-from-mars/ 8

INTEREST OF AMICI CURIAE[1]

The National League of Cities (NLC) is the oldest and largest organization representing municipal governments throughout the United States. Its mission is to strengthen and promote cities as centers of opportunity, leadership, and governance. Working in partnership with 49 State municipal leagues, NLC serves as a national advocate for the more than 19,000 cities, villages, and towns it represents.

The U. S. Conference of Mayors (USCM), founded in 1932, is the official nonpartisan organization of all United States cities with a population of more than 30,000 people, which includes over 1,200 cities at present. Each city is represented in the USCM by its chief elected official, the mayor.

The National Association of Counties (NACo) is the only national organization that represents county governments in the United States. Founded in 1935, NACo provides essential services to the nation's 3,069 counties through advocacy, education, and research.

The International City/County Management Association (ICMA) is a nonprofit professional and educational organization of over 9,000 appointed chief executives and assistants serving cities, counties, towns, and regional entities. ICMA's mission is to create excellence in local governance by advocating and developing the professional management of local governments throughout the world.

---

[1] No counsel for any party authored this brief in whole or in part and no entity or person, other than amici curiae, their members, and their counsel, made any monetary contribution toward the preparation or submission of this brief. Counsel of record for all parties have consented to this filing in letters on file with the clerk's office.

The International Municipal Lawyers Association (IMLA) has been an advocate and resource for local government attorneys since 1935. Owned solely by its more than 3,000 members, IMLA serves as an international clearinghouse for legal information and cooperation on municipal legal matters.

The American Planning Association (APA) is a non-profit, public interest research organization founded in 1978 to advance the art and science of land use, economic and social planning at the local, regional, state, and national levels. APA, based in Chicago, Illinois and Washington, D.C., and its professional institute, the American Institute of Certified Planners, represent more than 43,000 practicing planners, elected officials, and citizens in 46 regional chapters, working in the public and private sector to formulate and implement planning, land use, and zoning regulations, including the regulation of signs. APA has long educated the nation's planning professionals on the planning and legal principles that underlie effective sign regulation through publications[2] and training programs, as well as by filing numerous amicus curiae briefs in support of sign regulation in state and federal courts across the country.

Scenic America, Inc. is a national nonprofit conservation organization that is dedicated to preserving and enhancing the visual character of America's communities and countryside.

---

[2] *See, e.g.*, DANIEL MANDELKER, ET AL., STREET GRAPHICS AND THE LAW (2004), https://www.planning.org/pas/reports/subscriber/archive/pdf/PAS_527.pdf; Christopher J. Duerkson & Matthew R. Goebel, *Billboards, Signs, and Newsboxes*, *in* AESTHETICS, COMMUNITY CHARACTER, AND THE LAW (2000).

INTRODUCTION

Amici are concerned that local governments will face a nearly impossible task in crafting constitutional sign regulations if they are unable to utilize a common sense classification of temporary signs based upon their functions. Signs are speech and thus can be categorized or differentiated only by what they say. This makes it impossible to overlook a sign's content or message in attempting to formulate regulations on signage or even make exceptions required by law. If the mere categorization of signs by function renders them "content-based," per Petitioners' absolutist approach, few sign regulations will meet the exacting strict scrutiny test.

Amici have joined in one brief to explain to this Court that the adoption of the absolutist approach to defining "content-neutrality" will prevent local governments from legislating common sense classifications for temporary and permanent signage, whether election signs, free expression signs, temporary directional signs, identification signs, for sale signs, construction signs, directory signs, grand opening signs, or the like. In this brief, amici hope to clarify the true nature of sign regulations and explain why application of strict scrutiny would wreak havoc.

SUMMARY OF ARGUMENT

Amici begin with an overview of how sign codes typically work in the United States. Although the exact terminology and standards vary, comprehensive sign codes typically regulate signs that impact traffic safety and a community's appearance, both of which are considered substantial or important government interests in sign law. Comprehensive sign regulations

do not censor speech, control viewpoint, or shape the subject of public debate.

Multiple categories of temporary signs, usually classified by the function they serve, are ubiquitous. Each category recognizes a sign type that serves a unique purpose, with its own set of time, place, and manner considerations. For example, in a geographically large jurisdiction with potentially tens of thousands of election signs on display at the time of an election, should the removal deadline be the same as the deadline for removing a handful of temporary directional signs for a special event? Regulating by function allows communities to balance the need to protect safety and property values with the need to inform. While signs might be categorized as "on-site" or "off–site," or permanent or temporary by reference to their content, that does not make sign code regulations "content-based" for First Amendment purposes.[3] And the fact that a temporary sign must be read to determine what kind of temporary sign it is does not render the regulation "content-based" and trigger strict scrutiny.

The three categories of temporary signs at issue in this case, Temporary Directional Signs, Political Signs, and Ideological Signs, are "content-neutral" on their face, meaning strict scrutiny should not apply. Even when these three categories of temporary signs are compared with each other, they are regulated by purpose, rather than by content. To preserve the ability of local governments to advance important

---

[3] Sign codes distinguish temporary and permanent signs by temporal dimension. They distinguish among permanent signs by content ("on-site" versus "off-site" among other distinctions) and among temporary signs by content ("for sale," "campaign," "going out of business," and "events," among others).

objectives such as aesthetics and safety, these temporary sign categories should be reviewed under intermediate scrutiny which properly balances the interests involved.

ARGUMENT

Amici agree with Respondents' criticism that the record does not support the formulation of the Question Presented as whether content-neutrality is a subjective or objective test.[4] *See* Resp't Br. 5-6, n.2. The Ninth Circuit did not apply a subjective test, and amici agree with Respondents that the test should be objective. This brief focuses on the actual issue which is whether Gilbert's regulation of temporary noncommercial signs is facially unconstitutional, merely because Gilbert has tailored the physical characteristics of each sign type to its function.

I. COMPREHENSIVE SIGN REGULATIONS IN GENERAL

This Court noted unanimously in *City of Ladue v. Gilleo*, 512 U.S. 43 (1994) that signs present special regulatory challenges not applicable to other forms of speech:

> While signs are a form of expression protected by the Free Speech Clause, they pose distinctive problems that are subject to municipalities' police powers. Unlike oral speech, signs take up space and may obstruct

---

[4] Petitioners phrase the Question Presented as: "Does Gilbert's mere assertion of a lack of discriminatory motive render its facially content-based sign code content-neutral and justify the code's differential treatment of Petitioners' religious signs?" Pet'rs' Br. i.

> views, distract motorists, displace alternative uses for land, and pose other problems that legitimately call for regulation. It is common ground that governments may regulate the physical characteristics of signs—just as they can, within reasonable bounds and absent censorial purpose, regulate audible expression in its capacity as noise. *See, e.g., Ward v. Rock Against Racism*, 491 U.S. 781 (1989); *Kovacs v. Cooper*, 336 U.S. 77 (1949).

While sign regulation has First Amendment implications, comprehensive sign regulations are principally concerned with aesthetics[5] and traffic safety.[6] Gilbert, similar to many local governments, includes beauty, community appearance, and safety among the purposes behind its comprehensive sign regulations. *See* GILBERT SIGN CODE § 4.401, J.A. 25-27. Regulating for aesthetics helps to preserve property values and enhance the beauty of a community, while regulating

---

[5] The role of aesthetics in providing for the public welfare was recognized long ago in *Berman v. Parker*, 348 U.S. 26, 33 (1954), and it is well-established that a state may legitimately exercise its police powers to advance aesthetic values. *Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 805 (1984); *Berman*, 348 U.S. at 32-33 (the public welfare includes aesthetic values).

[6] *See City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 444 (2002) (Kennedy, J., concurring) (noting that speech can cause secondary effects unrelated to the impact of the speech on its audience, for example, a "billboard may obstruct a view"). *See also Covenant Media of South Carolina, LLC v. Town of Surfside Beach*, 321 Fed. Appx. 251 (4th Cir. 2009) (promoting traffic safety and aesthetics are substantial governmental interests); *Arlington County Repub. Comm. v. Arlington County*, 983 F.2d 587, 594 (4th Cir. 1993) (aesthetics and traffic safety are substantial governmental goals).

for traffic safety helps to protect lives.[7] The aesthetic values of a community are enhanced when its design and development standards are coordinated to achieve desired characteristics. Deviations from those standards may detract from community appearance and from property values.[8]

---

[7] In *Naser Jewelers, Inc. v. City of Concord*, 513 F.3d 27, 35 (1st Cir. 2008), the First Circuit considered traffic safety in deciding whether a city could ban Electronic Messaging Centers (EMC), electronic signs that flash constantly changing messages and opined:

> Concord's interests in traffic safety and community aesthetics would be achieved less effectively without the ordinance's prohibition on EMCs. We give some respect to "the accumulated, common-sense judgments of local lawmakers and of the many reviewing courts that billboards are real and substantial hazards to traffic safety." *Metromedia*, 453 U.S. at 509 (plurality opinion). It is given that a billboard can constitute a traffic hazard. It follows that EMCs, which provide more visual stimuli than traditional signs, logically will be more distracting and more hazardous. *See Chapin Furniture Outlet, Inc. v. Town of Chapin*, 2006 U.S. Dist. LEXIS 72483, 2006 WL 2711851, at *4 (D. S.C. Sept. 20, 2006), *vacated on other grounds by Chapin Furniture Outlet, Inc. v. Town of Chapin*, 252 Fed. Appx. 566, 2007 U.S. App. LEXIS 25378, 2007 WL 3193854 (4th Cir. 2007) (holding, in the context of EMC regulations, that "the Town's judgment that flashing or scrolling signs constitute a traffic hazard . . . is not unreasonable"). Indeed, plaintiff's own witness stated that bypassers focus more on rapidly blinking electronic signs than static signs. This constitutes a greater hazard. Further, for drivers a flashing light is often a signal of hazard on the roadway, a signal which itself slows and disrupts the traffic flow.

[8] While aesthetics generally may be in the eye of the beholder, it is not difficult to imagine that turning a house into a billboard would detract from property values. *See* Ben Forer, *Get*

In many jurisdictions, sign regulations are classified as "land development" regulations. Comprehensive sign regulations are not speech-licensing or censorship schemes but are chiefly concerned with the form and appearance of the development of land in a variety of zoning settings (residential, mixed-use, commercial, industrial, agricultural, and the like). In summary, although the exact terminology may vary, most comprehensive sign regulations follow a traditional and well-established approach. They address traffic safety and aesthetics similar to the transformative regulations adopted in Clearwater, Florida, shown clearly in the before-and-after pictures below.[9]

Your Mortgage Paid by Turning Your House into a Billboard, ABC NEWS BUSINESS BLOG (Feb 29, 2012, 4:33 PM), http://abcnews.go.com/blogs/business/2012/02/get-your-mortgage-paid-for-by-turning-your-house-into-a-billboard/ ("'We're looking for homes to turn into billboards. In exchange, we'll pay your mortgage every month for as long as your house remains painted,' the firm's website reads."); Sue Pekarek, *Home Mortgage Assistance from Braniacs from Mars*, HOUSEKABOODLE (Oct. 26, 2012), http://www.housekaboodle.com/home-mortgage-assistance-from-brainiacs-from- mars/ ("Brainiacs From Mars marketing company will paint your house a broccoli green and sunrise orange and place ads for their company along with some social media ads and then . . . make your mortgage payment for up to a year.").

[9] Dkt. 47 (Affidavit of Ethel D. Hammer, ¶ 3, Vol. I, Section IV (Comparative Photographs) (September 1988 and March 2002), filed April 11, 2002, in *Granite State Outdoor Adv. Inc. v. City of Clearwater*, No. 8:01-cv-01663-JSM (M.D. Fla.).

GULF TO BAY BLVD.
CLEARWATER FLORIDA

A. Exemptions and Exceptions

When developing a sign code, a local governing body will first decide to what extent to exercise its police power to regulate signage based upon its community character. The regulatory approach to signage on the Las Vegas strip or Times Square is, and should be, fundamentally different than that used in a quaint New England town or a suburban Arizona town such as Gilbert.

Any local government considering sign rules must first decide which visual communication devices

actually need regulation, and which should be left to private choice. The scope of a sign code is determined by the definition of the word "sign." Local governments routinely exclude from that definition many devices that ordinary citizens would not even consider to be signs, or at least devices not needing regulation. The common exclusions include grave markers, building cornerstones, search lights, and stained glass windows. The legislative choice not to regulate these devises does not favor any particular messages, messengers, or viewpoints. Rather, it prevents regulatory overreach by balancing limited government and protection of the public viewscape.

B. Prohibited Sign Types

A local government will exercise its police power to prohibit or limit certain permanent sign types based upon locational criteria (*e.g.*, off-site signs,[10] number of freestanding signs per lot, spacing, and setbacks), placement criteria (*e.g.*, roof signs, ground signs, wall signs, and projecting signs), physical attributes (*e.g.*, flashing signs, animated signs, revolving signs, and wind-activated sign-devices), and limit certain sign types by other physical or placement criteria (*e.g.*, sign height and size). Local governments also prohibit signs that mimic traffic control devices; for example, a

---

[10] Off-site signs, commonly known as "billboards," are distinguished from on-site signs by function and location. Neither the prohibition of billboards nor the limitations on the physical characteristics of permanent off-site signs are impermissible "content-based" distinctions. *See Messer v. City of Douglasville*, 975 F.2d 1505, 1509 (11th Cir. 1992); *Clear Channel Outdoor, Inc. v. City of Los Angeles*, 340 F.3d 810, 814-15 (9th Cir. 2003); *Wheeler v. Commissioner of Highways*, 822 F.2d 586, 591 (6th Cir. 1987), *cert. denied*, 484 U.S. 1007 (1988), *reh'g denied*, 485 U.S. 944 (1988).

business advertising sign that mimics a stop sign placed along a street.

The most common prohibited or restricted sign type (other than traffic control device mimic signs) is the permanent off-site (billboard) sign. This Court has recognized the unique problems that this sign type poses to local land use planners. *See Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 510 (1981) (White, J., plurality opinion). *See also Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 806-07 (1984) (summarizing *Metromedia*: "[t]here the Court considered the city's interest in avoiding visual clutter, and seven Justices explicitly concluded that this interest was sufficient to justify a prohibition on billboards"). Many communities prohibit permanent off-site signs altogether, while other communities allow them subject to height, size, and locational limitations.[11] *See also St. Louis Poster Advertising Co. v. City of St. Louis*, 249 U.S. 269, 274 (1919) (billboards properly may be put in a class by themselves). Censorship and viewpoint-control play no role in these policies.

C. Regulated Signs

After a local government decides what will be defined as a sign and what sign types will be

---

[11] The American Planning Association and the American Society of Landscape Architects have adopted specific policies that address billboard controls given the interest in protecting and preserving the beauty, character, economic, and aesthetic value of land and improving visual quality. AMERICAN PLANNING ASSOCIATION, POLICY GUIDE ON BILLBOARD CONTROLS (Apr. 1997), http://www.planning.org/policy/guides/adopted/billboards.htm; AMERICAN SOCIETY OF LANDSCAPE ARCHITECTS, BILLBOARDS AND SIGNAGE (2010), http://www.asla.org/uploadedFiles/CMS/Government_Affairs/Public_Policies/Billboards.pdf.

prohibited, it must then determine the location, size, duration, and other attributes of the signs that it will regulate. These signs initially fall into two types defined by duration, which are then further categorized by function: (1) *temporary signs* and (2) *permanent signs*.

1. *Temporary Signs.* Temporary signs are categorized by the function they serve. Six of the most common sign types are: (a) temporary real estate signs (for sale, for lease, and for rent)[12]; (b) temporary construction signs (usually identifying a site with an active building permit and construction underway); (c) temporary grand opening signs for new businesses (identifying the existence and location of a new business for a short duration following its initial opening); (d) temporary campaign/election signs (sometimes broadly labeled political signs)[13] that identify support for or opposition to ballot issues or candidates for elected office during the period prior to the election; (e) free expression or ideological signs that allow for a noncommercial message on any topic (as distinguished from election signs),[14] and (f) temporary special event

---

[12] Local governments must provide for this sign type in their sign regulations. *See Linmark Associates, Inc. v. Willingboro*, 431 U. S. 85 (1977).

[13] *See* Jules B. Gerard, *Evolving Voices in Land Use Law: A Festschrift in Honor of Daniel R. Mandelker: Part III: Zoning Aesthetics: Chapter 5: The Takings Clause and Signs: Election Signs and Time Limits*, 3 WASH. U. J.L. & POL'Y 379, 380 (2000).

[14] *See City of Ladue v. Gilleo*, 512 U.S. 43 (1994). The requirement to allow free expression through signage on all residential property was highlighted in *Ladue*. There the property owner had first sought to place a six square-foot ideological sign on her lawn with the message, *Say No to War in the Persian Gulf, Call Congress Now*, and then sought to place a one square-foot sign on the inside of a window with the message, *For Peace in the Gulf*.

or directional signs that identify or provide directions to an upcoming or current public or semi-public event (such as a homecoming celebration for a national guard unit, a county fair, or a seasonal, occasional, or periodic event). Numerous constitutional claims have been brought involving the latter two temporary sign-types, *temporary campaign/election signs* and *temporary special event or directional signs*, which have produced uneven outcomes. Gilbert's "content-neutral" exemption from permitting for temporary directional signs is at the heart of this case.

2. *Permanent Signs.* While temporary signs are generally tied to short-term events and provide important, yet ephemeral information, permanent signs are most often associated with the development of land and will have a long-lasting impact on a community's aesthetics. The character of the zoning district and/or the property use will impact the regulatory limits on the sign's characteristics, whether freestanding or attached to a building, such as (a) the height, (b) the size or area (dimensions or square-footage), (c) the type of freestanding sign (pole or monument, wall or roof), (d) its setback (distance from roadways and/or buildings), (e) the number of signs per lot/parcel, and (f) the spacing between freestanding signs.

The placement of *permanent* sign structures on land or on buildings impacts the aesthetic development of a community in material ways. Businesses and institutions in commercial or industrial districts require some on-site identification sign that identifies who, what, and where they are. Such signage needs

---

An outright prohibition of this medium of speech was rejected as unconstitutional. Such a message may be a permanent sign type when it is not related to a time-bound event.

are usually accommodated by both freestanding signs (pole signs, monument/ground signs) and wall signs, and may also be accommodated in certain situations by other sign types such as canopy signs. Certain institutional or quasi-public uses, such as schools, religious institutions, and theaters, may require bulletin board signs that announce regular activities or events.

Permanent signs are very diverse. Restaurants may use drive-through lanes with menus displayed for vehicle occupants to place orders, so they need a sign regulation that accommodates drive-through menu signs. Gas stations use additional signage at self-service islands and pumps, some of which is legally mandated. Low-to-ground "enter," "exit" or "drive-through" signs may be needed to accommodate both vehicular and pedestrian safety concerns. Permanent sign regulations provide for height, size, number, and other qualifying standards to balance safety concerns with aesthetic concerns.

D. Warning Signs (Temporary and Permanent)

Warning signs alert of a danger or a hazard associated with a location and are common across both urban and rural landscapes.[15] *Permanent* warning signs are associated with buried underground cables, underground gas or electric lines, high voltage locations, railroad crossings, and the like. *Temporary*

---

[15] Compare Gilbert's regulations, which have two sign types relevant to political speech: Political Signs, which provide additional temporary speech rights related to candidates and ballot issues prior to an election, and Ideological Signs, which allow both temporary and permanent expression of political and other ideas.

warning signs may be associated with "sidewalk closed," "detour," and the like. Warning signs serve an important function, are unique to the location or property on which they are displayed or posted, and can be described only by the function that they serve. *See Granite State Outdoor Advertising, Inc. v. City of Clearwater*, 213 F. Supp. 2d 1312, 1333 (M.D. Fla. 2002), *aff'd in part and rev'd in part on other grounds*, 351 F.3d 1112 (11th Cir. 2003), *cert. denied*, 543 U.S. 813 (2004).

E. Permitting for Allowed Sign Types

As noted above, sign types can be (i) exempt from regulation where the local government has decided not to extend its police power to regulate certain types of signs, (ii) prohibited within a jurisdiction, often because of their physical or locational characteristics, or (iii) allowed with or without express sign permitting. The need for a sign permit is ordinarily tied to the need for enforcement, safety, or other practical factors. Different permitting considerations apply based upon whether the signs are temporary or permanent:

1. *Permitting for temporary signs.* Generally, temporary signs do not require a permit because their presence is for a very brief duration or discrete election cycle. Also erecting temporary signs (depending on the structure and location of the sign) does not involve construction or alteration of a permanent structure requiring a building permit to assure safety and soundness. Requiring a permit for such temporary signage may also prove impractical because of limited government resources. Regulatory criteria will usually provide sufficient guidance *vis-a-vis* the height, size, setback, number, and the like. If those

criteria are not complied with, an enforcement mechanism can usually effectively address violations. On some occasions, a local government may require some form of permitting (with or without fees) for temporary "special event" signage that are likely to pose problems (such as sign removal after a large special event or planning for police to handle unusual traffic).

2. *Permitting for permanent signs.* In contrast to temporary signs, permanent signs may require permits due to their height and size, their number on a lot/parcel, their setback, and other characteristics that are not ephemeral. Usually, local governments will ensure that the proposed design of permanent signs meets criteria for their physical and locational characteristics *before* they are fabricated, constructed, and erected because they obstruct the public view. Permitting also ensures that money will not be wasted erecting and removing an illegal structure.

Certain smaller permanent sign types, however, do not pose the same threats, and are therefore often exempt from permitting: nameplates, street address signs, small warning signs (high voltage, buried gas line, *etc.*), low-profile enter/exit signs, or other *de minimis* sign types. While these exempted signs are classified by the function they serve, they are by no means a "content-based" scheme requiring strict scrutiny review.

To the extent that permanent sign structures in which messages will be displayed are allowed only by permit, the First Amendment is implicated. However, permanent signs are regulated by the functions they serve and the dangers that they or any incorporated components or devices (such as intermittent lights) might present. Permitting is not intended (a) to censor, (b) to regulate a particular viewpoint, or (c) to

control the subject matter of debate. In short, permitting requirements for permanent sign structures is not a regulatory censorship scheme or speech-licensing scheme just as categorizing temporary signs by function is not such a scheme.

F. Sign Codes Vary

While most sign codes in the United States follow the general approach described above, some of the specifics vary. This is primarily because aesthetic concerns often vary based on the following differences (i) urban and rural environments, (ii) large cities and small cities, (iii) communities with no bodies of water or coastlines and those with waterfronts and coastlines, of (iv) different regions of a state, and (v) mountainous areas with short lines of sight. The drafting land development regulations often involves public input to address safety concerns and issues pertaining to community character on both macro and micro levels. For these reasons, all sign codes are somewhat idiosyncratic within the widely accepted general framework.

G. Role of Content in Sign Regulations

Content plays a role in sign regulations. For example, a sign's message will categorize it as an election sign, a time-and-temperature sign, a historic marker, a drive-thru menu sign, an ideological sign, a traffic sign, and the like. And on-site and off-site signs must be read and compared to their location to determine which category they belong to. But for First Amendment purposes, these classifications are by no means a "content-based" censorial scheme requiring strict scrutiny review. They are merely separate

categories based on common sense functional differences.

II. READING A SIGN TO DETERMINE ITS CATEGORY DOES NOT MAKE THE REGULATION "CONTENT-BASED"

Petitioners argue that if a city official has to read the content of a temporary sign to determine what kind of temporary sign it is, then its regulation is "content-based" and subject to strict scrutiny. In *Granite State Outdoor Advertising, Inc. v. City of Clearwater*, 213 F. Supp. 2d at 1333-34, the district court succinctly describes how this issue arises:

> What makes the content-based versus content-neutral distinction so difficult in cases involving sign ordinances is that, by their very nature, signs are speech and thus can only be categorized, or differentiated, by what they say. This makes it impossible to overlook a sign's "content" or message in attempting to formulate regulations on signage and make exceptions for distinctions required by law (*i.e.*, for sale signs) or for those signs that are narrowly tailored to a significant government interest of safety (*i.e.*, warning or construction signs). For example, there is simply no other way to make an exemption or classify a for sale sign as a for sale sign without reading the words "For Sale" on the sign, or classifying a sign as a warning sign without reading the words "Warning Bad Dog" on the sign. In many cases, this classification raises the "red flag" of an impermissible "content-based" regulation. *See Metromedia*, 453 U.S. at 565, 101 S. Ct. 2882

> (Burger, J. dissenting) (referring to differentiating among topics and "noncontroversial things" and "conventional" signs such as time-and-temperature signs, historical markers, and for sale signs).

This Court should reject the argument that reading a sign to determine how it is classified renders the regulation "content-based," for the same pragmatic reason the Fourth Circuit rejected it in *Wag More Dogs v. Cozart*, 680 F.3d 359, 365 (4th Cir. Va. 2012)—signs *must* be read to determine if they are compliant with the governing sign regulations.

> Wag More Dogs advances a syllogistic argument to support its claim that the Sign Ordinance is unconstitutional on its face as a content-based restriction on speech: Any regulation that differentiates between types of speech is content based. The Sign Ordinance imposes different requirements on different types of speech. Therefore, the Sign Ordinance is content based. But Wag More Dogs would have us hew to a Euclidean commitment to wooden logic, where the law instead demands a more pragmatic judgment. Viewing the Sign Ordinance with reference to precedent that applies a practical analysis of content neutrality, requiring that a regulation do more than merely differentiate based on content to qualify as content based, we conclude that the Sign Ordinance is content neutral and satisfies intermediate scrutiny.

Other courts have similarly observed that the proper inquiry is not whether a sign must be read, but whether the distinctions made in sign codes impermissibly regulate speech. As the court stated in

National Advertising Co. v. City of Miami, Florida, 287 F Supp. 2d 1349, 1376 (S.D. Fla. 2003), *rev'd on other grounds*, 402 F.3d 1329 (11th Cir. 2005), *cert. denied*, 546 U.S. 1170 (2006):

> There is no question that First Amendment precedent, including *Metromedia*, clearly establishes the general rule that the government cannot "regulate speech in ways that favor some viewpoints or ideas at the expense of others." *Taxpayers for Vincent*, 466 U.S. at 804, 104 S.Ct. 2118. However, this general rule is not applicable in cases where "there is not even a hint of bias or censorship in the [c]ity's enactment or enforcement of [the] ordinance." *Id.* This is particularly true where "[t]he text of the ordinance is neutral-indeed it is silent-concerning any speaker's point of view. ." *Id.*

If the fact that a sign must be read makes it "content-based," then sign codes making logical, non-viewpoint based distinctions that advance important governmental objectives will be subjected to unnecessarily high constitutional scrutiny and the courts will be called upon to act as "super" regulatory agencies. *See Dodd v. Hood River County*, 136 F.3d 1219, 1230 (9th Cir. 1998) (citations omitted) ("The Courts of Appeals were not created to be 'the Grand Mufti of local zoning boards.'").

The First Amendment's guarantee of "freedom of speech" grew out of the abuse by the monarch and Parliament in 16th- and 17th- Century England to license speech flowing from the printing press of that era. *See Thomas v. Chicago Park Dist.*, 534 U.S. 316, 320 (2002). The stifling of free expression where speech may be favored or disfavored based upon its

content through the exercise of censorship is clearly the harm the First Amendment seeks to protect against. *See id.* at 323. The government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. *See Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972), and the government must not choose which issues are worth discussing or debating. *See id.* at 96. Keeping open the "marketplace" of ideas or viewpoints is central to this Court's teachings. *See id.*; *see also Consol. Edison Co. of N.Y., Inc. v. Pub. Serv. Comm'n*, 447 U.S. 530, 537-38 (1980) (quoting *Mosley*, 408 U.S. at 96); *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 377 (1984); *Simon & Schuster, Inc. v. Members of State Crime Victims Bd.*, 502 U.S. 105, 116 (1991); *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994).

It is well settled that the state may legitimately exercise its police powers to advance aesthetic values. *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 805 (1984). In *Vincent*, this Court observed that there was not even a hint of bias or censorship in the City's enactment or enforcement of an ordinance pertaining to posting signs on public property, no claim that the ordinance was designed to suppress certain ideas that the City found distasteful, or had been applied based on viewpoint. *See id.* at 506. Most significantly, as to the facial challenge against the ordinance, this Court observed that, "[the] text [of the ordinance] is neutral—indeed it is silent—concerning any speaker's point of view " *Id.* And in *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) this Court stated that the principal inquiry in determining "content-neutrality," in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a

regulation of speech because of disagreement with the message it conveys.

In summary, simply because a sign must be read to determine how it is categorized indicates no agreement or disagreement with the sign's message and does not render it "content-based" for First Amendment purposes.

III. GILBERT'S PROVISION FOR TEMPORARY DIRECTIONAL SIGNS IS "CONTENT-NEUTRAL" ON ITS FACE

Gilbert's regulation of Temporary Directional Signs Relating to a Qualifying Event is "content-neutral" *on its face*.[16] A Qualifying Event is defined broadly as any

---

[16] GILBERT SIGN CODE § 4.402.P reads: ***Temporary Directional Signs Relating to a Qualifying Event.*** Temporary Directional Signs Relating to a Qualifying Event shall be permitted subject to the following regulations:

1. *Size.* Signs shall be no greater than 6 feet in height and 6 square feet in area.
2. *Number.* No more than 4 signs shall be displayed on a single property at any time.
3. *Dis[illegible]* Signs shall only be displayed up to 12 hours b[illegible], during, and 1 hour after the Qualifying Event ends. The person who installed the signs shall be responsible for removal. If the person installing the signs is unknown, the property owner shall be responsible.
4. *Location.* Temporary Directional Signs Relating to a Qualifying Event may be located off-site and shall be placed at grade level. Signs shall be placed only with the permission of the owner of the property on which they are placed.
5. *Prohibited Locations.* Temporary Directional Signs Relating to a Qualifying Event shall not be located:

assembly, gathering, activity, or meeting sponsored, arranged, or promoted by a religious, charitable, community service, educational, or other similar non-profit organization. J.A. 70. Qualifying Event Temporary Directional Signs are "content-neutral" because any religious organization, charity, or non-profit, no matter what its viewpoint or subject matter, may put up a sign related to an event under this provision.

Temporary directional sign provisions similar to Gilbert's are common among sign ordinances throughout the United States. Their function is to aid persons in finding an event that is ephemeral, while the purpose of the vast majority of sign types is to identify a permanent structure or fixed physical location. They represent a balancing of interests in limiting sign clutter, while at the same time allowing an avenue of communication, among the many others available, to provide the public directions to an event, whether it be one-time or recurring.

Petitioners and their amici argue that Petitioners' Temporary Directional Signs, inviting and directing people to the location of Petitioners' church services, are disadvantaged in relation to Political Signs and temporary or permanent Ideological Signs. Rather

---

a. In the public right-of-way.

b. On fences, boulders, planters, other signs, vehicles, utility facilities, or any structure.

6. *Construction.* Signs shall be:

a. Constructed of durable and weather-resistant materials.

b. Anchored or weighted down to avoid being displaced in windy conditions, or otherwise to be a safety hazard to the public.

J.A. 38-39, 75-76, 88.

than forcing event directional messages into another sign type, where they don't logically belong, Gilbert has reasonably chosen to provide them their own category. This separate sign type is constitutionally permissible because event-oriented signs, which are not designed for core ideological speech, may be subject to different time, place, and manner requirements than election or ideological signs, which always contain core ideological speech, and are subject to heightened First Amendment protection. As Respondents explain, Gilbert allows organizations such as churches to have both directional and informational signs, instead of limiting their options to one or the other; they just cannot combine the two in a manner not contemplated by the Code. Resp't Br. 24-25.

Gilbert's regulation of Temporary Directional Signs are appropriately tailored to their function of directing traffic to an event. On its face nothing in the Gilbert Sign Code suggests that its temporary directional signage provision disadvantages the free-speech rights of one side of a public debate or ideological divide. And nothing prevents Petitioners from posting Ideological Signs if their goal is to spread a religious message, as discussed further below.

Finally, Petitioners and their amici argue that it is improper for Gilbert to require their sign to conform to one defined sign type, and that it is unclear how Gilbert's regulation applies to hypothetical combinations of messages not at issue in this case. The Ninth Circuit properly refused to provide an advisory opinion on this issue over which there is no case or controversy. *See Reed v. Gilbert*, 707 F.3d 1057, 1065 n.6 (9th Cir. 2013).

IV. GILBERT'S PROVISION FOR POLITICAL SIGNS (TEMPORARY ELECTION SIGNS) IS "CONTENT-NEUTRAL" ON ITS FACE

Gilbert, similar to local governments throughout the United States, categorizes and regulates temporary election signs differently from other temporary signs. Such signs express core ideological speech related to an election, which only has meaning within a specific time period. Such signs do not provide directions to campaign offices or polling places. Gilbert's Political Sign regulation is "content-neutral" because any idea related to a candidate or issue in an election may be supported or opposed.

Temporary election signs have long been considered distinct from and accorded more deference than temporary off-site directional signs, which do not communicate ideological speech and simply provide vehicular or pedestrian traffic directions to an event. The First Amendment accords special significance to political speech during a campaign for public office.[17] In fact, limitations placed upon temporary election signs have frequently been struck down due to the significance given to core political speech, especially during an election cycle.[18]

---

[17] *See Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 223 (1989) (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971); *Burson v. Freeman*, 504 U.S. 191, 196-97 (1992). *See also Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 898 (2010).

[18] *See, e.g., Dimas v. City of Warren*, 939 F. Supp. 554 (E.D. Mich. 1996) (durational limit of 45 days before an election unconstitutional); *Arlington County Repub. Comm. v. Arlington County*, 983 F.2d 587, 594 (4th Cir. 1993) (limiting election signs

Gilbert allows Political Signs, with dimensions that vary between property zoned for residential use (16 square feet) and nonresidential use (32 square feet), without a permit during the period before an election. Political Signs must be removed within a short durational period (10 days) after the election is held. *See* GILBERT SIGN CODE § 4.402.I. Gilbert is more than 70 square miles and has a population that exceeds 200,000 people.[19] Such a time period for removing temporary election signs after an election cycle is not uncommon in large localities.[20]

Recently, the Arizona State Legislature passed legislation that extended protection to temporary election signs in the public right-of-way before an election. *See* ARIZ. REV. STAT. § 16-1019 (2011). While this is not as common elsewhere in the United States, affording greater protection to political speech during the election cycle is consistent with the significance accorded to political speech. *See, e.g., McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995); *Burson v. Freeman*, 504 U.S 919 (1992).

V. GILBERT'S PROVISION FOR IDEOLOGICAL SIGNS (FREE EXPRESSION SIGNS) IS "CONTENT-NEUTRAL" ON ITS FACE

Gilbert, again similar to many local governments throughout the United States, allows free expression

---

to two per parcel was unconstitutional given the core ideological nature of the speech that such signs contain).

[19] *See Gilbert, Arizona*, WIKIPEDIA, http://en.wikipedia.org/wiki/Gilbert,_Arizona (last visited Nov. 11, 2014).

[20] *See, e.g., Arlington County Republican Committee v. Arlington County, Va*, 983 F.2d 587, 594 n.8 (4th Cir. 1993) (court noted with approval election sign regulation limiting posting from 70 days prior to the election to 10 days after the election).

signs, defined at GILBERT SIGN CODE § 4.402.J as Ideological Signs,[21] in all zoning districts in Gilbert. Whether a parcel is residential or nonresidential, an Ideological Sign up to 20 square feet in area and up to six feet in height may be displayed. Political Signs and Ideological Signs serve unique and different functions in the political process. Similar to Political Signs, Ideological Signs provide an opportunity for any ideological message (political or not) to appear on any parcel in any zoning district in Gilbert. While the right-of-way is not expressly included as a permissible location, Ideological Signs can be displayed at any time, for any length of time, and the message can be freely substituted at will.[22] Ideological Signs are "content-neutral" because any non-commercial message may be expressed.

Gilbert's Ideological Sign Code category is not unusual; many cities allow ideological (sometimes called free expression or opinion) signs year–round,

---

[21] An Ideological Sign is a category distinct from both a Political Sign (Election Sign) and a Temporary Directional Sign Relating to a Qualifying Event. The Glossary of General Terms to Gilbert's Land Development Code provides:

> *Ideological Sign*. Ideological Sign means a sign communicating a message or ideas for non-commercial purposes that is not a Construction Sign, Directional Sign, Temporary Directional Sign Relating to a Qualifying Event, Political Sign, Garage Sale Sign, or a sign owned or required by a government agency.

J.A. 66-67, 77.

[22] *Compare Herson v. San Carlos*, 714 F. Supp. 2d 1018, 1021 (N.D. Cal. 2010), *aff'd*, 433 Fed. Appx. 569 (9th Cir. 2011) (sign regulation providing for substitution of speech, to avoid the favoring of commercial speech over non-commercial speech, or of some kinds of non-commercial speech over other kinds of non-commercial speech).

with additional temporary speech rights provided through Political Signs during election season.[23] Nothing precludes Petitioners from having an Ideological Sign proclaiming their faith and mission on parcels throughout Gilbert—as long as they obtain the express or implied permission of the property owner. Significantly for purposes of First Amendment considerations, Gilbert does not require Petitioners to obtain a permit to post such signs.

Gilbert's Sign Code recognizes that limitations on size, location, and duration of Ideological Signs fall within the ambit of reasonable time, place, and manner regulatory authority. So while it allows for Ideological Signs with the same message as that expressed in *Brown v. Town of Cary*, 706 F.3d 294 (4th Cir. 2013), ("Screwed by the Town of Cary") it would not allow a homeowner to turn his or her house into that sign, just as the Town of Cary's regulations did not allow a sign to exceed the size limitation for a residential wall sign. *See Brown*, 706 F.3d at 298, 305 (size, color, and positioning restrictions).

Faced with a lower court ruling that Cary's decision to disallow the wall sign while allowing holiday decorations amounted to a "content-based" sign regulation, the Fourth Circuit concluded:

> [W]e reject any absolutist reading of content neutrality, and instead orient our inquiry toward why—not whether—the Town has distinguished content in its regulation.

---

[23] *See, e.g., Brayton v. City of New Brighton*, 519 N.W.2d 243 (Minn. Ct. App. 1994), *cert. denied*, 514 U.S. 1036 (1995) (holding that sign ordinance allowing only one year-round non-commercial opinion sign, with additional signs during the election season, was constitutional).

> Viewed in that light, we are satisfied that the Sign Ordinance is content neutral. Applying the intermediate scrutiny required for content neutral restrictions on speech, we hold that the Sign Ordinance does not violate the First Amendment.

Id. at 301.

VI. GILBERT'S SIGN REGULATIONS FOR TEMPORARY DIRECTIONAL SIGNS RELATING TO A QUALIFYING EVENT REMAIN "CONTENT-NEUTRAL" WHEN COMPARED WITH POLITICAL SIGNS AND IDEOLOGICAL SIGNS

This Court should not adopt a constitutional mandate that these different sign types must be subject to *identical* regulations. Communities should decide through a planning process the dimensional criteria, height, number, setback, and the like for temporary sign types. Identical rules simply do not make sense for all temporary sign types, which is why local governments have not adopted them.

Rather than take the absolutist approach,[24] Amici urge this Court to adopt the rule stated in *Brown*, 706 F.3d 294, and its antecedents,[25] because it offers

---

[24] *See Neighborhood Enters., Inc. v. City of St. Louis*, 644 F.3d 728, 736 (8th Cir. 2011); *Serv. Emps. Int'l Union, Local 5 v. City of Houston*, 595 F.3d 588, 596 (5th Cir. 2010); *Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250, 1263–66 (11th Cir. 2005).

[25] *H.D.V.-Greektown, LLC v. City of Detroit*, 568 F.3d 609, 620-25 (6th Cir. 2009). *See also Scadron v. City of Des Plaines*, 734 F. Supp. 1437, 1445-47 (N.D. Ill. 1990), *aff'd*, 989 F.2d 502 (Table) (7th Cir. 1993) (adopting "the analysis contained in the excellent opinion by the district court"; the district court analyzed the opinions in *Metromedia* as they bear on the question presented

significant protections to First Amendment free speech while protecting community interests in reasonable sign regulation. That rule provides:

> A regulation is not a content-based regulation of speech if (1) the regulation is not a regulation of speech, but rather a regulation of the places where some speech may occur; (2) the regulation was not adopted because of disagreement with the message the speech conveys; or (3) the government's interests in the regulation are unrelated to the content of the affected speech.

Brown, 706 F.3d at 17-18.

Local governments may not be able to prove a "compelling interest" in the different temporary sign type categories. If the absolutist approach is adopted, sign regulations nationwide will be upended as unconstitutional. When rewritten to meet the absolutist standard, they will defy common sense, lack effectiveness, and in many cases are likely to even restrict speech more than if common sense functional exceptions and exemptions were allowed. The

---

here); *Giovani Carandola Ltd v. Bason*, 303 F.3d 507, 512-13 (4th Cir. 2002); *Clearwater*, 213 F. Supp. 2d 1312 (M.D. Fla. 2002), *aff'd in part and rev'd in part on other grounds*, 351 F.3d 1112 (11th Cir. 2003), *Granite State Outdoor Advertising, Inc. v. City of St. Petersburg, Fla.*, No. 8:01–cv–2250–T–30MSS2, 2002 WL 34558956, *7, 11 (M.D. Fla. Oct. 18, 2002), *aff'd in part and rev'd in part*, 348 F.3d 1278 (11th Cir. 2003), *cert. denied*, 541 U.S. 1086 (2004); *G.K. Ltd. Travel v. Lake Oswego*, 436 F.3d 1064, 1071-84 (9th Cir. 2006), *cert. denied*, 549 U.S. 822 (2006); *Covenant Media of S.C., LLC v. City of N. Charleston*, 493 F.3d 421, 431-35 (2007), *cert. denied*, 552 U.S. 1100 (2008); *Melrose, Inc. v. City of Pittsburgh*, 613 F.3d 380, 389 (3d Cir. 2010), *cert. denied*, 131 S. Ct. 1008 (2011).

absolutist approach is game, set, and match for the Nation's sign regulations despite the fact that they do not run afoul of the standards set forth in *Mosley*, 408 U.S. 92, *Metromedia*, 453 U.S. 490, *Vincent*, 466 U.S. 789, *Ward*, 491 U.S. 781, or the more recent decisions in the context of buffer zones in *Hill v. Colorado*, 530 U.S. 703, 719-21 (2000), and *McCullen v. Coakley*, 134 S. Ct. 2518, 2528-34 (2014).[26]

* * *

This case provides an opportunity for this Court to clearly articulate the legal standards applicable to our Nation's sign regulations, to reject the notion that a sign regulation is "content-based" because a sign must be read to be categorized, and to eschew applying strict scrutiny to categories of sign regulations that—for functional reasons—have different time, place, and manner provisions. Petitioners are clearly not victims of any effort to censor speech, control viewpoint, or shape public debate by the government based upon the face of Gilbert's regulations. Their First Amendment rights have not been violated.

---

[26] Amici are aware of the Court's split over whether the laws establishing buffer zones at abortion clinics favor or disfavor the viewpoint of one side or the other of a public debate. Viewpoint discrimination is not present in this case.

CONCLUSION

For all of these reasons, the Court should affirm the judgment below.

Respectfully submitted,

LISA SORONEN
Executive Director
STATE & LOCAL LEGAL CENTER
444 North Capitol St. NW
Suite 515
Washington, DC 20001

RANDAL R. MORRISON
SABINE & MORRISON
PO Box 531518
San Diego CA 92153-1518
(619) 234-2864

WILLIAM D. BRINTON
Counsel of Record
ROGERS TOWERS, P.A.
1301 Riverplace Boulevard
Suite 1500
Jacksonville, FL 32207
(904) 398-3911
wbrinton@rtlaw.com

SUSAN L. TREVARTHEN, FAICP
WEISS SEROTA HELFMAN COLE BIERMAN & POPOK, PL
200 E. Broward Boulevard
Suite 1900
Fort Lauderdale, FL 33301
(954) 763-4242

Counsel for Amici Curiae

November 21, 2014

AMICUS CURIAE BRIEF

RECORD AND BRIEFS

Supreme Court, U.S.
FILED
SEP 22 2014
OFFICE OF THE CLERK

No. 13-502

In the
Supreme Court of the United States

PASTOR CLYDE REED, AND
GOOD NEWS COMMUNITY CHURCH,

Petitioners,

v.

TOWN OF GILBERT, ARIZONA,
AND ADAM ADAMS, IN HIS OFFICIAL
CAPACITY AS CODE COMPLIANCE MANAGER,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

DEBORAH J. LA FETRA
Counsel of Record
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
E-mail: dlafetra@pacificlegal.org

Counsel for Amicus Curiae
Pacific Legal Foundation

QUESTION PRESENTED

The Town of Gilbert's Sign Code categorizes temporary signs based on their content and then restricts their size, duration, location, and other characteristics depending on the category into which each sign is placed. Under the Sign Code, Good News Community Church's temporary signs promoting church services receive far worse treatment than temporary signs promoting political, ideological, and various other messages, even though they equally impact Gilbert's interests in safety and aesthetics. By finding the Sign Code content neutral and upholding it under the First Amendment, the Ninth Circuit deepened a three-way conflict among eight Courts of Appeals.

The question presented is:

Does Gilbert's mere assertion of a lack of discriminatory motive render its facially content-based sign code content-neutral and justify the code's differential treatment of Petitioners' religious signs?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
INTEREST OF AMICUS CURIAE	1
INTRODUCTION AND SUMMARY OF ARGUMENT	2
ARGUMENT	4
I. JUST AS AN OTHERWISE CONSTITUTIONAL STATUTE CANNOT BE STRUCK DOWN ON THE BASIS OF AN ALLEGED ILLICIT LEGISLATIVE MOTIVE, NEITHER CAN AN ALLEGED PURE MOTIVE SAVE AN UNCONSTITUTIONAL STATUTE	4
A. A "Pure" Motive Cannot Save Facially Unconstitutional Legislation	4
B. The State "Speaks" Through Official Acts, Not Subjective Motivations of State Employees or Elected Officials	7
II. IN OTHER CONSTITUTIONAL CONTEXTS, GOVERNMENT CANNOT DEMONSTRATE A COMPELLING STATE INTEREST UPON MERE ASSERTION OF A PURE OR INNOCENT MOTIVE	9
A. Due Process	10
B. Race-based Decisionmaking	12

TABLE OF CONTENTS—Continued

Page

C. Search and Seizure 16

CONCLUSION 17

TABLE OF AUTHORITIES

Page

Cases

Adams v. Bd. of County Comm'rs of Douglas County, 1 F. Cas. 106 (D. Kan. 1868) 6

Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995) . . 13

Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221 (1987) . . 6

Avery v. State of Georgia, 345 U.S. 559 (1953) 16

Baker v. City of St. Petersburg, 400 F.2d 294 (5th Cir. 1968) 14

Batson v. Kentucky, 476 U.S. 79 (1986) 15-16

Bluewater Network v. E.P.A., 370 F.3d 1 (D.C. Cir. 2004) 8

Bond v. United States, 529 U.S. 334 (2000) 16-17

Brigham City, Utah v. Stuart, 547 U.S. 398 (2006) . . 16-17

Carey v. Brown, 447 U.S. 455 (1980) 5-6

Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876 (2010) 1, 4

City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425 (2002) 3

City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986) 5

TABLE OF AUTHORITIES—Continued

	Page
College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999)	8
County of Sacramento v. Lewis, 523 U.S. 833 (1998)	11-12
Fed. Election Comm'n v. Beaumont, 539 U.S. 146 (2003)	1-2
Franco v. Moreland, 805 F.2d 798 (8th Cir. 1986)	11
Frisby v. Schultz, 487 U.S. 474 (1988)	5
Gregory v. Ashcroft, 501 U.S. 452 (1991)	9
Groh v. Ramirez, 540 U.S. 551 (2004)	16
Grutter v. Bollinger, 539 U.S. 306 (2003)	13
Hayes v. North State Law Enforcement Officers Ass'n, 10 F.3d 207 (4th Cir. 1993)	14-15
Hayworth v. City of Oakland, 129 Cal. App. 3d 723 (1982)	15
Howard v. Grinage, 82 F.3d 1343 (6th Cir. 1996)	11
In re Houts, 7 Wash. App. 476 (1972)	10
John Donnelly & Sons v. Campbell, 639 F.2d 6 (1st Cir. 1980)	3
Knox v. Serv. Employees Int'l Union, Local 1000, 132 S. Ct. 2277 (2012)	1

TABLE OF AUTHORITIES—Continued

	Page
Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978)	17-18
Leist v. Simplot, 638 F.2d 283 (2d Cir. 1980)	8
McCray v. United States, 195 U.S. 27 (1904)	7
McDowell v. Watson, 59 Cal. App. 4th 1155 (1997)	6
Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353 (1982)	8
Metro Broadcasting, Inc. v. F.C.C., 497 U.S. 547 (1990)	13
Michelle Hug, Henstock, Inc. v. City of Omaha, 275 Neb. 820 (2008)	6
Michigan v. Fisher, 558 U.S. 45 (2009)	17
Miller-El v. Dretke, 545 U.S. 231 (2005)	16
Muschany v. United States, 324 U.S. 49 (1945)	8-9
Nike, Inc. v. Kasky, 539 U.S. 654 (2003)	1
Palmer v. Thompson, 403 U.S. 217 (1971)	7
Parents Involved in Community Schools v. Seattle School Dist. No. 1, 551 U.S. 701 (2007)	13
Patrolmen's Benevolent Ass'n of City of New York v. City of New York, 310 F.3d 43 (2d Cir. 2002)	14

TABLE OF AUTHORITIES—Continued

	Page
Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1 (1981)	9
Perry Educ. Ass'n v. Perry Local Educator's Ass'n, 460 U.S. 37 (1983)	4
Reed v. Town of Gilbert, Arizona, 707 F.3d 1057 (9th Cir. 2013)	2
Regan v. Time, Inc., 468 U.S. 641 (1984)	4
Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978)	13
Ricci v. DeStefano, 557 U.S. 557 (2009)	12
Sackett v. E.P.A., 132 S. Ct. 1367 (2012)	7-8
Scott v. United States, 436 U.S. 128 (1978)	16
Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd., 502 U.S. 105 (1991)	5-6
Sorrell v. IMS Health Inc., 131 S. Ct. 2653 (2011)	1, 5
Thompson v. United States, 246 U.S. 547 (1918)	8
Turner Broadcasting System, Inc. v. F.C.C., 512 U.S. 622 (1994)	4-5
Twin City Pipe Line Co. v. Harding Glass Co., 283 U.S. 353 (1931)	8
U.S. v. Playboy Entertainment Group, Inc., 529 U.S. 803 (2000)	4

TABLE OF AUTHORITIES—Continued

	Page
U.S. v. Timmann, 741 F.3d 1170 (11th Cir. 2013)	17
United States v. O'Brien, 391 U.S. 367 (1968)	7
Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977)	6
W.R. Grace & Co. v. Local Union 759, Int'l Union of United Rubber, Cork, Linoleum & Plastic Workers of America, 461 U.S. 757 (1983)	9
Wall Distributors, Inc. v. City of Newport News, Va., 782 F.2d 1165 (4th Cir. 1986)	5
Ward v. Rock Against Racism, 491 U.S. 781 (1989)	2-3, 5
Weinberger v. Rossi, 456 U.S. 25 (1982)	6
Wine & Spirits Retailers, Inc. v. Rhode Island and Providence Plantations, 552 U.S. 889 (2007)	1
Wittmer v. Peters, 87 F.3d 916 (7th Cir. 1996)	14
Rules	
Sup. Ct. R. 37.3(a)	1
Rule 37.6	1
Miscellaneous	
La Fetra, Deborah J., *Kick It Up a Notch: First Amendment Protection for Commercial Speech*, 54 Case W. Res. L. Rev. 1205 (2004)	2

TABLE OF AUTHORITIES—Continued

Page

Sandefur, Timothy, *The Right to Earn a Living* (2010) 2

INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37.3(a), Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of the Petitioner.[1]

PLF was founded in 1973 and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF litigates matters affecting the public interest at all levels of state and federal courts, and represents the views of thousands of supporters nationwide. In furtherance of PLF's continuing mission to defend individual and economic liberties, the Foundation operates its Free Enterprise Project, that seeks, among other things, to ensure that all speakers enjoy the full protection of the First Amendment to the United States Constitution. To that end, PLF has participated in several cases before this Court and others on matters affecting the public interest, including issues related to the First Amendment. *See, e.g.*, *Knox v. Serv. Employees Int'l Union, Local 1000*, 132 S. Ct. 2277 (2012); *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (2011); *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876 (2010); *Wine & Spirits Retailers, Inc. v. Rhode Island and Providence Plantations*, 552 U.S. 889 (2007); *Nike, Inc. v. Kasky*, 539 U.S. 654 (2003); and *Fed. Election*

---

[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

Comm'n v. Beaumont, 539 U.S. 146 (2003). PLF attorneys also have published on the commercial speech doctrine. *See, e.g.*, Deborah J. La Fetra, *Kick It Up a Notch: First Amendment Protection for Commercial Speech*, 54 Case W. Res. L. Rev. 1205 (2004); Timothy Sandefur, *The Right to Earn a Living* (2010).

INTRODUCTION AND SUMMARY OF ARGUMENT

The Town of Gilbert's Sign Code categorizes temporary signs and then restricts their size, duration, location, and other characteristics depending on the category into which each sign is placed. *Reed v. Town of Gilbert, Arizona*, 707 F.3d 1057, 1061 (9th Cir. 2013). Depending on whether the town categorizes signs as Political, Ideological, promoting a "Qualifying Event," or conveying messages from "Homeowners Associations," or about Real Estate, the Sign Code imposes vastly different size, duration, number, location, and other requirements within each content-based category. Under the Sign Code, Good News Community Church's temporary signs promoting church services receive far worse treatment than temporary signs promoting political, ideological, and various other messages. *Id.* The signs in all of these categories equally impact the town's interests in safety and aesthetics.

Given the categorizations of different types of speech (depending both on the speaker and on the message conveyed), the Sign Code on its face is content-based. Content-based regulations prohibit or compel speech on certain subjects or views; whereas content-neutral regulations are unrelated to the content of speech. *Ward v. Rock Against Racism*, 491

U.S. 781, 791 (1989); *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 448 (2002) (Kennedy, J., concurring) ("[W]hether a statute is content neutral or content based is something that can be determined on the face of it; if the statute describes speech by content then it is content based."). Yet based on the town's mere assertion that the Sign Code was meant to further safety and aesthetic goals, the Ninth Circuit held that this innocuous motive meant the Sign Code was content neutral, *id.* at 1069, and upheld it under the First Amendment, in conflict with other circuit courts.

Courts should consider legislative motive only when the plain language of a legislative act is unclear, and then only in the cause of *protecting* civil rights; if consideration of the purity or maliciousness of legislative motive cuts against individual liberty, it should be disregarded. *See John Donnelly & Sons v. Campbell*, 639 F.2d 6, 8 (1st Cir. 1980) ("[W]hen First Amendment freedoms are on one side of the scale, the balance must be struck by the courts, not by the legislators."). The Ninth Circuit erred in accepting the government's assurances when those assurances were contradicted by the plain language of the challenged legislation. The Sign Code facially distinguishes among types of speech and regulates them based on how the town categorizes the speech. This content-based discrimination should be reviewed under strict scrutiny and struck down.

This Court should reverse the decision below, and hold that content-neutrality is determined objectively by the law's language, regardless of the government's asserted motivation.

ARGUMENT

I

JUST AS AN OTHERWISE CONSTITUTIONAL STATUTE CANNOT BE STRUCK DOWN ON THE BASIS OF AN ALLEGED ILLICIT LEGISLATIVE MOTIVE, NEITHER CAN AN ALLEGED PURE MOTIVE SAVE AN UNCONSTITUTIONAL STATUTE

A. A "Pure" Motive Cannot Save Facially Unconstitutional Legislation

Because the First Amendment protects the right to speak freely, courts are especially suspicious of regulations that allow the government "to discriminate on the basis of the content of the message." *Regan v. Time, Inc.*, 468 U.S. 641, 648-649 (1984); *Citizens United*, 130 S. Ct. at 882 ("Premised on mistrust of governmental power, the First Amendment stands against attempts to disfavor certain subjects or viewpoints.") (citing *U.S. v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813 (2000) (striking down content-based restriction). In short, the government may not "pick and choose." *Perry Educ. Ass'n v. Perry Local Educator's Ass'n*, 460 U.S. 37, 55 (1983). As detailed in the Petition for Writ of Certiorari, the lower courts have differing approaches to deciding whether a particular regulation is content based or content neutral. Pet. Cert. at 19-27.

Many content-based regulations are adopted because the government agrees or disagrees with the message it conveys. *Turner Broadcasting System, Inc.*

v. F.C.C., 512 U.S. 622, 642-43 (1994) (citing *Ward v. Rock Against Racism*, 491 U.S. at 791). But this is not the only reason for a content-based statute. *See Sorrell v. IMS Health Inc.*, 131 S. Ct. at 2665, 2666 (government argued that statute preventing pharmaceutical company marketing was "mere commercial regulation" or involved only "conduct, not speech"). To determine the purpose or justification of a regulation, courts primarily look at the plain language of the statute. *See Carey v. Brown*, 447 U.S. 455, 460-61 (1980) ("On its face, the Act accords preferential treatment to the expression of views on one particular subject."); *Frisby v. Schultz*, 487 U.S. 474, 481 (1988).

To be constitutional, an ordinance that implicates free speech rights must be predominantly concerned with eradicating the undesirable secondary effects of the speech activity, rather than silencing the speech itself. *See City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986). In assessing the predominate concern, the "courts must look only to the face of the regulation and the identifiable interest advanced to justify the regulation." *Wall Distributors, Inc. v. City of Newport News, Va.*, 782 F.2d 1165, 1170 (4th Cir. 1986). A government's asserted purpose for regulating speech is of limited utility in determining the constitutionality of the regulation, however. A content-based purpose is not necessary, though it may be sufficient in certain circumstances, to show that a regulation is content based. *Turner*, 512 U.S. at 642 (citing *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 502 U.S. 105, 117 (1991) ("'[I]llicit legislative intent is not the *sine qua non* of a violation of the First Amendment'") (citation omitted)).

More importantly for this case, "[n]or will the mere assertion of a content-neutral purpose be enough to save a law which, on its face, discriminates based on content." *Id.* (citing *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 231-32 (1987); *Carey*, 447 U.S. at 464-69).

The subjective motivation of legislators is irrelevant. "Motive may be inferred and judged from circumstances, but is not very well capable of direct proof; a mere assertion, or even an assertion sustained by affidavit amounts generally to no more than an opinion." *Adams v. Bd. of County Comm'rs of Douglas County*, 1 F. Cas. 106, 109-10 (D. Kan. 1868). To the extent that a statute's interpretation turns on legislative intent, the courts' examination of such intent should be limited to the official legislative history, which does not include post-enactment opinions from legislators. *See Weinberger v. Rossi*, 456 U.S. 25, 35 n.15 (1982) ("[T]he contemporaneous remarks of a sponsor of legislation are certainly not controlling in analyzing legislative history.").[2]

This Court strongly disfavors inquiries into legislators' motives for enacting statutes, even where the statute is allegedly aimed at the content of the plaintiff's speech. *See Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 268 n.18 (1977)

---

[2] *See also Michelle Hug, Henstock, Inc. v. City of Omaha*, 275 Neb. 820, 825 (2008) ("One member of a legislature which passes a law is not competent to testify regarding the intent of the legislature in passing that law.") (quotation omitted); *McDowell v. Watson*, 59 Cal. App. 4th 1155, 1161 n.3 (1997) ("Generally, the motive or understanding of an individual legislator is not properly received as evidence of [the legislature's] collective intent, even if that legislator was the author of the bill in question.").

(questioning legislative motivation represents "substantial [judicial] intrusion into the workings of other branches of government"); *McCray v. United States*, 195 U.S. 27, 56 (1904) ("The decisions of this court from the beginning lend no support whatever to the assumption that the judiciary may restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted."); *United States v. O'Brien*, 391 U.S. 367, 383 (1968) (An otherwise constitutional statute will not be struck down "on the basis of an alleged illicit legislative motive.").

As a constitutional matter, and in the service of protecting individual liberty, this reluctance to inquire as to legislative motives must cut both ways. If courts will not invoke legislative motives as a reason to strike down legislation, *Palmer v. Thompson*, 403 U.S. 217, 224-26 (1971), *O'Brien*, 391 U.S. at 383, neither may legislators offer their motives as a reason to uphold otherwise flawed legislation.

B. The State "Speaks" Through Official Acts, Not Subjective Motivations of State Employees or Elected Officials

The government "speaks" on matters of public policy through official acts—legislation, executive orders, and the like.[3] Courts determine legislative

---

[3] The government speaks through other official communications as well, and is bound by the language of those communications rather than post-hoc explanations about what the communications "really meant." In *Sackett v. E.P.A.*, 132 S. Ct. 1367, 1372-73 (2012), property owners challenged a compliance order that demanded they cease and desist filling an area of disputed wetlands, upon grave penalties if they failed to do so. The EPA (continued...)

intent primarily by looking to the language of the enactment, and where the language is "reasonably intelligible and plain, it must be accepted without modification by resort to construction or conjecture." *Thompson v. United States*, 246 U.S. 547, 551 (1918); *Bluewater Network v. E.P.A.*, 370 F.3d 1, 13 (D.C. Cir. 2004) ("We begin our interpretation of the provision with the 'assumption that legislative purpose is expressed by the ordinary meaning of the words used.' ") (citations omitted). For example, all states retain sovereign immunity unless the state expressly waives that immunity. *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 680 (1999). Similarly, Congress must speak explicitly when it intends remedies to be exclusive. *Leist v. Simplot*, 638 F.2d 283, 313 (2d Cir. 1980) ("When as here Congress adds a new remedy . . where other remedies had been clearly recognized, it would be expected to say so if it meant the new remedy to be exclusive."), *aff'd sub nom., Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353 (1982).

Public policy is expressed through legislation. *Twin City Pipe Line Co. v. Harding Glass Co.*, 283 U.S. 353, 357 (1931) ("Primarily it is for the lawmakers to determine the public policy of the state."). Public policy is not to be ascertained from general judicial considerations of supposed public interests; rather, "there must be found definite indications in the law of the sovereignty to justify the invalidation of a contract

---

[3] (...continued)
argued that the letter was merely an invitation to engage in informal negotiations, but this Court held that the compliance order's language was firm and clear, and therefore final for the purpose of challenging it in court. *Id.*

as contrary to that policy." *Muschany v. United States*, 324 U.S. 49, 66 (1945); *W.R. Grace & Co. v. Local Union 759, Int'l Union of United Rubber, Cork, Linoleum & Plastic Workers of America*, 461 U.S. 757, 766 (1983) (Public policy must be "explicit," "well defined," and "dominant."). *See also Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991) (declining to interpret the Age Discrimination in Employment Act of 1967 as covering state judges, and explaining that Congress will not be understood to have intruded upon "a decision of the most fundamental sort for a sovereign entity," implicating "the structure of [state] government," unless Congress says so in unmistakably clear language); *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 24 (1981) ("Congress must express clearly its intent to impose conditions on the grant of federal funds so that the States can knowingly decide whether or not to accept those funds.").

Once the Gilbert Town Council established its public policy in the form of the Sign Code (amended twice since the onset of this litigation to reflect the town's continuing goals to regulate speech), reviewing courts should have been limited to identifying that policy and whether the stated means of pursuing it comport with constitutional requirements.

II

IN OTHER CONSTITUTIONAL CONTEXTS, GOVERNMENT CANNOT DEMONSTRATE A COMPELLING STATE INTEREST UPON MERE ASSERTION OF A PURE OR INNOCENT MOTIVE

Beyond the First Amendment context, this Court and others have considered the role of government

motive in cases where plaintiffs assert constitutional rights that generally are reviewed with strict or heightened scrutiny. The Court here should require an objective assessment of the government's actions, as it does in the many other contexts described below, rather than simply giving the government the benefit of the doubt based on its self-interested say-so.

A. Due Process

Courts reviewing procedural due process claims are unwilling to consider subjective motivations as a reason to permit government action that results in a deprivation without notice and a hearing. For example, in *In re Houts*, 7 Wash. App. 476, 484 (1972), the state permanently took away the Houts' children after a hearing that included few safeguards for the Houts' constitutional rights. Among other things, the trial court hearing and meetings in chambers were held without the presence of Mr. and Mrs. Houts, *id.* at 480, their own attorney did not insist on a competency hearing, thus admitting that they were incompetent, *id.* at 483-84, and they were denied the opportunity to confront the witnesses against them. *Id.* at 480. The court acknowledged that it had "no doubt" that everyone involved in the process was "well motivated in following the procedure," but the court was emphatic that "good motives do not excuse the violation of the parents' constitutional right to a hearing when parents are sought to be permanently deprived of their children." *Id.* at 484. On an objective basis, the court held that "the hearing did not conform to due process requirements." *Id.*

Cases arising when prisoners allege unconstitutional treatment also demand objective evidence of the government's actions, and disregard

prison officials' subjective motivations, even when those motivations are benign (*e.g.*, quelling violence among inmates). *See Howard v. Grinage*, 82 F.3d 1343, 1352 (6th Cir. 1996) (finding, in the context of a deliberate indifference claim under § 1983, that "A prison official's motivation, or lack thereof, is simply irrelevant in a post-deprivation procedural due process case. If the conduct resulting in the deprivation [meets the objective standard for deliberate indifference, then] a constitutional violation results even if the decision to deprive was made with the best of motives"); *Franco v. Moreland*, 805 F.2d 798, 801 (8th Cir. 1986) (where prisoner challenged "administrative segregation," court rejected a jury instruction that permitted the segregation without a hearing if the corrections officer's actions were "laudable" or "justified," holding that "[n]either justification nor good motive is a defense when a liberty interest gives one a right to notice of charges and an opportunity to explain").

Substantive due process claims similarly must rest on objective government interests—not bare declarations of such interests. The government's mere assertion that a legitimate interest motivated its actions does not necessarily void an otherwise properly pleaded due process claim. For example, in *County of Sacramento v. Lewis*, 523 U.S. 833, 840 (1998), this Court considered whether a high-speed police chase that resulted in the death of a passenger on the pursued vehicle violated the passenger's substantive due process rights. Despite the county's assertion that the pursuing officer was entitled to immunity, the passenger's survivors argued that the high-speed chase amounted to a constitutional violation because the officer's actions "were an abuse of executive power so clearly unjustified by any legitimate objective of law

enforcement." *Id.* at 840. In his concurring opinion, Justice Kennedy (joined by Justice O'Connor), emphasized the "objective character of our substantive due process analysis." *Id.* at 856. Justice Kennedy lamented that the phrase "shocks the conscience" has "the unfortunate connotation of a standard laden with subjective assessments," because " the test can be used to mark the beginning point in asking whether or not the objective character of certain conduct is consistent with our traditions, precedents, and historical understanding of the Constitution and its meaning." *Id.* at 857. And on the flip side, the Court must consider "an objective assessment of the necessities of law enforcement." *Id. See also id.* at 865 (Scalia, J., and Thomas, J., concurring in the judgment) (finding no violation, not because the county's actions were subjectively shocking, but because "respondents offer no textual or historical support for their alleged due process right.").

B. Race-based Decisionmaking

Race-based decisionmaking by the government is presumed unconstitutional, and may be permitted only in limited circumstances. This Court demands objective evidence of such needs. In *Ricci v. DeStefano*, 557 U.S. 557, 592 (2009), white firefighters who should have been promoted on the basis of their test scores sued the city of New Haven, Connecticut, under Title VII because the City promoted firefighters on racially discriminatory grounds. The city said it had to engage in the discriminatory treatment because it feared disparate impact liability lawsuits if it promoted based on test scores. This Court rejected the city's subjective fear, however, finding no objective evidence to support it. *Id.*

Although *Ricci* was a Title VII case, race-discrimination cases brought under the Fifth or Fourteenth Amendments command a similarly objective approach. The Constitution does not permit race-based government decisionmaking simply because a school district claims a remedial purpose and proceeds in good faith with arguably pure motives. *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 741 (2007) ("Our cases clearly reject the argument that motives affect the strict scrutiny analysis."); *see also id.* at 751 (Thomas, J., concurring) ("The constitutional problems with government race-based decisionmaking are not diminished in the slightest by the presence or absence of an intent to oppress any race or by the real or asserted well-meaning motives for the race-based decisionmaking."). The *PICS* court relied on "clear" reasons for rejecting a motives test, namely, that the courts have a poor track record in identifying motives, and whether those motives are in fact benign. *Id.* at 742 (citing *Metro Broadcasting, Inc. v. F.C.C.*, 497 U.S. 547, 609-10 (1990) (O'Connor, J., dissenting) (" '[B]enign' carries with it no independent meaning, but reflects only acceptance of the current generation's conclusion that a politically acceptable burden, imposed on particular citizens on the basis of race, is reasonable."), and *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 226 (1995) ("'[I]t may not always be clear that a so-called preference is in fact benign'" (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 298 (1978) (opinion of Powell, J.)). *See also Grutter v. Bollinger*, 539 U.S. 306, 371 (2003) (Thomas, J., concurring in part and dissenting in part) (citation omitted).

In *Patrolmen's Benevolent Ass'n of City of New York v. City of New York*, 310 F.3d 43 (2d Cir. 2002), the Second Circuit reviewed the forced transfer of black police officers into a precinct for the purpose of quelling potential racial violence stemming from white officers' horrific assault on a black Haitian immigrant, Abner Louima. *Id.* at 48-49. The transferred officers claimed that their assignment was based on race, violating the Fourteenth Amendment. *Id.* at 52. The city's sole justification was that the transfers were required for "effective law enforcement." *Id.* The court held that the assignment of police officers to certain neighborhoods or tasks because of their race has been rightly held to run afoul of the Fourteenth Amendment. *Id.* (citing *Baker v. City of St. Petersburg*, 400 F.2d 294, 300 (5th Cir. 1968)). Thus, "[t]he mere assertion of an 'operational need' to make race-conscious employment decisions does not, however, give a police department *carte blanche* to dole out work assignments based on race" if it cannot establish an objective justification. *Id.*

Because the "operational need" defense to race-based employment actions is obviously susceptible to abuse, courts recognizing the defense require the government to demonstrate that it is "motivated by a truly powerful and worthy concern and that the racial measure adopted is a plainly apt response to that concern." *Wittmer v. Peters*, 87 F.3d 916, 918 (7th Cir. 1996); *Patrolmen's Benevolent Ass'n*, 310 F.3d at 52. The justification must be substantiated *by objective evidence*—mere speculation or conjecture is insufficient. *Id.* at 918-19. For example, in *Hayes v. North State Law Enforcement Officers Ass'n*, 10 F.3d 207, 213-14 (4th Cir. 1993), the Fourth Circuit rejected

the police chief's "opinion" based on significant experience and his "genuine desire" to help the police department "perform up to its highest potential" because "the dangers of relying on subjective evidence to support utilization of racial classifications in employment promotion decisions are apparent." Specifically, reliance on subjective evidence to permit "benign" race-conscious policies would allow others to "use this same rationale for a much less benign purpose." *Id.* at 214. *See also Hayworth v. City of Oakland*, 129 Cal. App. 3d 723, 732 (1982) (although the City may have complied with the trial court's order in good faith, and without discriminatory motivation, as a matter of law its actions discriminated generally against white firefighters in violation of their constitutional and statutory rights).

On a related note, allegations of race-based peremptory challenges to jurors must be based on objective evidence, rather than subjective motivations. *Batson v. Kentucky*, 476 U.S. 79, 96 (1986), established the three-step framework for determining the constitutionality of these challenges: First, a defendant must establish a prima facie case of purposeful discrimination in the jury selection. To meet this requirement, he must show that (a) he is a member of a cognizable racial group; (b) the prosecutor exercised peremptory challenges to remove members of that racial group from the venire panel; and (c) all the relevant circumstances raise an inference that the prosecutor exercised the challenges on account of race. *Id.* Relevant circumstances may include a pattern of strikes against members of the racial group, as well as the types of questions the prosecutor asks in his or her *voir dire* examination. *Id.* at 97. The defendant also may rely on the fact that peremptory challenges

"constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.'" *Id.* at 96 (quoting *Avery v. State of Georgia*, 345 U.S. 559, 562 (1953)). Second, if the defendant establishes a prima facie case, the burden shifts to the state to provide a race-neutral explanation for challenging the jurors in question. The explanation *must be more than the mere assertion of a nondiscriminatory motive. Batson*, 476 U.S. at 97-98 ("[T]he prosecutor may not rebut the defendant's prima facie case of discrimination by stating merely that he challenged jurors of the defendant's race on the assumption—or his intuitive judgment—that they would be partial to the defendant because of their shared race."). Then, if the state provides an objectively plausible explanation, the court will decide whether the state engaged in purposeful discrimination. *Id.* at 98. *See also Miller-El v. Dretke*, 545 U.S. 231, 252 (2005) ("A *Batson* challenge does not call for a mere exercise in thinking up any rational basis.").

C. Search and Seizure.

Under the Fourth Amendment, a search or seizure without a warrant is presumed unreasonable and unconstitutional. *Groh v. Ramirez*, 540 U.S. 551, 559 (2004) (citation omitted). An action is "reasonable" under the Fourth Amendment, regardless of the individual officer's state of mind, "as long as the circumstances viewed objectively justify [the] action." *Brigham City, Utah v. Stuart*, 547 U.S. 398, 404 (2006) (citing *Scott v. United States*, 436 U.S. 128, 138 (1978) (emphasis added)).

The officer's subjective motivation is irrelevant. *See Bond v. United States*, 529 U.S. 334, 338 n.2 (2000)

("The parties properly agree that the subjective intent of the law enforcement officer is irrelevant in determining whether that officer's actions violate the Fourth Amendment ; the issue is not his state of mind, but the objective effect of his actions."). Thus, in *Brigham City*, when police officers viewed a fight in progress inside a house, with one person having already sustained an injury and bleeding, that was objective evidence of the officers' response to provide "emergency aid" sufficient to justify the warrantless entry. The respondents' claim that the police were more motivated by making arrests than preventing further violence was irrelevant. 547 U.S. at 404-05. *See also Michigan v. Fisher*, 558 U.S. 45, 49 (2009) (reaffirming objective test). *Cf. U.S. v. Timmann*, 741 F.3d 1170, 1180-81 (11th Cir. 2013) (Court refused to invoke "emergency aid" exemption to warrant requirement where it was not *objectively* reasonable for the officers to believe anyone inside the apartment was in need of immediate aid.).

CONCLUSION

The Town of Gilbert's Sign Code facially categorizes an array of speech, allowing signs with favored speech greater visibility and duration than signs with less-favored speech. There was no need for any court to inquire as to legislative intent given the content-based discrimination evident from the plain language of the ordinance.

> [T]he judicial function commands analysis of whether the specific conduct charged falls within the reach of the statute and if so whether the legislation is consonant with the

> Constitution. Were it otherwise, the scope of freedom of speech and of the press would be subject to legislative definition and the function of the First Amendment as a check on legislative power would be nullified.

Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 844 (1978). Beyond just looking at intent in this case, though, the court below established a constitutional test based on the subjective motivations of legislators and then used that test to justify the infringement of the Petitioners' free speech rights.

The judgment of the Ninth Circuit should be reversed.

DATED: September, 2014.

Respectfully submitted,

DEBORAH J. LA FETRA
Counsel of Record
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
E-mail: dlafetra@pacificlegal.org

Counsel for Amicus Curiae
Pacific Legal Foundation

AMICUS CURIAE BRIEF

RECORD AND BRIEFS

Supreme Court, U.S.
FILED
SEP 22 2014
OFFICE OF THE CLERK

No. 13-502

In the Supreme Court of the United States

PASTOR CLYDE REED AND GOOD NEWS COMMUNITY CHURCH, PETITIONERS

v.

TOWN OF GILBERT, ARIZONA AND ADAM ADAMS, IN HIS OFFICIAL CAPACITY AS CODE COMPLIANCE MANAGER

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF *AMICI CURIAE* STATE OF WEST VIRGINIA AND NINE OTHER STATES IN SUPPORT OF PETITIONERS

PATRICK MORRISEY
ATTORNEY GENERAL

ELBERT LIN
Solicitor General
Counsel of Record

OFFICE OF THE
ATTORNEY GENERAL
STATE CAPITOL
BUILDING 1, ROOM E-26
CHARLESTON, WV 25305
EL@WVAGO.GOV
(304) 558-2021

MISHA TSEYTLIN
Deputy Attorney General

JULIE MARIE BLAKE
J. ZAK RITCHIE
Assistant Attorneys General

Counsel for Amicus Curiae *State of West Virginia*

QUESTION PRESENTED

The Town of Gilbert's Sign Code categorizes temporary signs based on their content and then restricts their size, duration, location, and other characteristics depending on the category into which each sign is placed. Under the Sign Code, Good News Community Church's temporary signs promoting church services receive far worse treatment than temporary signs promoting political, ideological, and various other messages, even though they equally impact Gilbert's interests in safety and aesthetics.

The question presented is:

Does the Town of Gilbert's mere assertion that its sign code lacks a discriminatory motive render its facially content-based sign code content-neutral and justify the code's differential treatment of Petitioners' religious signs?

TABLE OF CONTENTS

Question Presented i

Table of Contents ii

Table of Authorities iii

Interest of *Amici Curiae* 1

Summary of Argument 2

Argument 4

I. A Law That Discriminates Against Speech Based Upon The Subject Matter That Is Being Discussed Is A Presumptively Invalid Content-Based Restriction On Speech 4

II. When A Law's Plain Text Discriminates Against Speech Based Upon Its Content, The Government's Allegedly Benign Motive For Enacting The Law Is Legally Irrelevant 9

Conclusion 16

TABLE OF AUTHORITIES

CONSTITUTIONAL PROVISION

U.S. Const. amend. I 5

CASES

Arkansas Writers' Project, Inc. v. Ragland,
481 U.S. 221 (1987) ..... passim

Bolger v. Youngs Drug Prods. Corp.,
463 U.S. 60 (1983) 5

Boos v. Barry,
485 U.S. 312 ..... 14, 16

Brown v. Entm't Merchs. Ass'n,
131 S. Ct. 2729 (2011) 6

Brown v. Town of Cary,
706 F.3d 294 (4th Cir. 2013) 12

Carey v. Brown,
447 U.S. 455 (1980) ..... passim

City of Cincinnati v. Discovery Network, Inc.,
507 U.S. 410 (1993) 10, 11

City of Los Angeles v. Alameda Books, Inc.,
535 U.S. 425 (2002) 10

City of Renton v. Playtime Theatres, Inc.,
475 U.S. 41 (1986) 6

FCC v. League of Women Voters of California,
468 U.S. 364 (1984) 7

Fletcher v. Peck,
10 U.S. 87, 6 Cranch 87 (1810) 14

Gitlow v. People of the State of New York,
268 U.S. 652 (1925) 5

Hill v. Colorado,
530 U.S. 703 (2000) 6

Linmark Assocs., Inc. v. Twp. of Willingboro,
431 U.S. 85 (1977) 6

Lovell v. City of Griffin,
303 U.S. 444 (1938) 5

McCullen v. Coakley,
134 S. Ct. 2518 (2014) 10

Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue,
460 U.S. 575 (1983) 11

Or. Waste Sys., Inc. v. Dep't of Envtl. Quality,
511 U.S. 93 (1994) 15

Perry Educ. Ass'n v. Perry Local Educators' Ass'n,
460 U.S. 37 (1983) ..... passim

Police Dep't of Chicago v. Mosley,
408 U.S. 92 (1972) ..... passim

R.A.V. v. City of St. Paul, Minn.,
505 U.S. 377 (1992) 2, 5, 15

Reed v. Town of Gilbert,
707 F. 3d 1057 (9th Cir. 2013) ..... passim

Rocky Mountain Farmers Union v. Corey,
730 F.3d 1070 (9th Cir. 2013) 15

Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.,
502 U.S. 105 (1991) 11

Sorrell v. IMS Health Inc.,
131 S. Ct. 2653 (2011) 14

Turner Broad. Sys., Inc. v. FCC,
512 U.S. 622 (1994) 5

United States v. O'Brien,
391 U.S. 367 (1968) 14

United States v. Stevens,
559 U.S. 460 (2010) 6

OTHER AUTHORITIES

Leslie Kendrick, *Content Discrimination Revisited*, 98 Va. L. Rev. 231 (2012) 8

Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 Harv. L. Rev. 417 (1899) 14

INTEREST OF *AMICI CURIAE*

In *Reed v. Town of Gilbert*, 707 F. 3d 1057 (9th Cir. 2013), the Court of Appeals for the Ninth Circuit refused to apply strict scrutiny to a town's sign ordinance despite the fact that it facially discriminates against speech that discusses certain subjects. The Ninth Circuit acknowledged that the ordinance draws "distinctions between Temporary Directional Signs, Ideological Signs, and Political Signs," and requires at least some consideration of the "substance" of the sign. *Id.* at 1069. Nevertheless, observing that the town "did not adopt its regulation of speech because it disagreed with the message conveyed," the court found the statute to be "content-neutral" and subject to intermediate scrutiny. *Id.* at 1071–72.

Amici Curiae—the States of West Virginia, Georgia, Kansas, Michigan, Montana, Nebraska, Oklahoma, South Carolina, Texas, and Utah—have a two-fold interest in this case. *First*, the States seek to protect their citizens' freedom of speech from unconstitutional discriminatory treatment of the type the town enacted in this case. The approach adopted by the Ninth Circuit would give governments—including the Federal Government—the authority to systematically favor speech about certain subjects over speech about other subjects, in violation of long-standing First Amendment protections. *Second*, the States have an interest in ensuring that judicial doctrine—whether in the First Amendment context or otherwise—properly

delineates and respects the role of the legislature. In particular, courts should not attempt intrusive inquiries into a legislature's subjective motivations in order to save a facially content-based restriction on speech. If a law's plain text discriminates based upon the content of speech, courts should simply strike down the law, except in the extremely rare cases where the content-based restriction can survive strict scrutiny.

SUMMARY OF ARGUMENT

This Court has developed several robust doctrines for protecting the First Amendment right to free speech, including a strong limitation on laws that discriminate against speech on the basis of content. Content-based restrictions on speech are "presumptively invalid." *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 382 (1992). The presumption can only be overcome by a showing that the discriminatory statute survives the demands of strict scrutiny. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983).

In order to give the First Amendment's broad terms sufficiently robust protection, this Court has consistently interpreted the concept of a "content-based" restriction broadly. As relevant in this case, this Court has repeatedly held that statutes are unlawfully content-based if they place greater burdens on the discussion of some "subject matter," as opposed to discussion of other "subject matter." *See Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972). Laws that discriminate on the basis of

subject matter, this Court has explained, impermissibly "presuppose[] that [public discussion of some issues is] more deserving of First Amendment protection than [public discussion] over other issues." *Carey v. Brown*, 447 U.S. 455, 466 (1980).

The sign code in the present case is a classic example of impermissible subject-matter discrimination on speech. The code allows more robust speech about political or ideological matters, while permitting far more limited speech about topics such as the timing and location of church meetings. As the dissenting judge below explained, the code's discriminatory regime is thus nothing more than an unlawful "determination that 'ideological' and 'political' speech is categorically more valuable, and therefore entitled to greater protection from regulation, than speech promoting events sponsored by non-profit organizations." *Reed v. Town of Gilbert*, 707 F 3d 1057, 1080 (9th Cir. 2013) (Watford, J., dissenting).

The panel majority wrongly concluded that the sign code is content-neutral—notwithstanding its plain text—by relying upon the town's subjective and allegedly non-censorial motivations for enacting the code. The majority determined that "the differing restrictions between types of noncommercial speech [were] adequately justified without reference to the content of the regulated speech." *Id.* at 1069 (quotations omitted). Put another way, the majority found that the code was not content-based because

the town "did not adopt its regulation of speech because it disagreed with the message conveyed." *Id.* at 1071.

There are at least three problems with the notion that a government's motivation can turn a textually content-discriminatory law into a content-neutral one. *First*, it is foreclosed by this Court's caselaw, which holds that it does not matter to the First Amendment analysis that a citizen subject to a discriminatory law can show "no evidence of an improper censorial motive." *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 228 (1987) (quotation omitted). *Second*, that approach to determining whether a law is content-based, and therefore subject to strict scrutiny, fails to give full meaning to the First Amendment's broad protections. *Third*, the Ninth Circuit's approach to content-based laws poses a threat to the integrity of the lawmaking process.

ARGUMENT

I. A LAW THAT DISCRIMINATES AGAINST SPEECH BASED UPON THE SUBJECT MATTER THAT IS BEING DISCUSSED IS A PRESUMPTIVELY INVALID CONTENT-BASED RESTRICTION ON SPEECH

The First Amendment—which applies not only to Congress but also to States and their political

subdivisions[1]—prohibits laws that "abridg[e] the freedom of speech." U.S. Const. amend. I. "At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994). "[T]he First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972).

To enforce this constitutional guarantee that citizens can speak about and listen to any message or idea, this Court has held that laws that place "differential burdens upon speech because of its content," *Turner Broad.*, 512 U.S. at 642, are "*presumptively invalid*," *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 382 (1992) (emphasis added). A governmental entity defending a content-based restriction on speech must carry a heavy burden. Specifically, it must demonstrate that the differential treatment of speech based upon content is "necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). Because this strict scrutiny standard is extremely demanding, "this Court has sustained content-based restrictions only in the most extraordinary circumstances." *Bolger v. Youngs*

---

[1] *See Gitlow v. People of the State of New York*, 268 U.S. 652, 666 (1925); *Lovell v. City of Griffin*, 303 U.S. 444, 450 (1938).

Drug Prods. Corp., 463 U.S. 60, 65 (1983). After all, "any restriction on expressive activity because of its content would completely undercut the profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *Carey v. Brown*, 447 U.S. 455, 462–63 (1980) (quotation omitted).[2]

Furthermore, consistent with the First Amendment's sweeping terms, this Court has construed broadly what constitutes a "content-based" restriction on speech. The "content" of speech includes the "message," "ideas," and "subject matter" being discussed. *Mosley*, 408 U.S. at 95. To take just a few out of innumerable examples, this Court has held that restrictions on violent video games and depictions of animal cruelty constitute content-based restrictions on speech. *See, e.g.*, *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729 (2011); *United States v. Stevens*, 559 U.S. 460 (2010). It has held that ordinances prohibiting the posting of the words "For Sale" and "Sold" are content-based. *Linmark Assocs.*,

---

[2] In contrast, this Court has not required a governmental entity to satisfy strict scrutiny where, for example, a law: (1) involves certain narrow "historically unprotected categories of speech," such as obscenity, *United States v. Stevens*, 559 U.S. 460, 470–71 (2010); (2) is directed at "secondary effects" of the speech, like the "neighborhood blight" created by adult theaters, *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 51 (1986) (quotation omitted); (3) governs the *mode* of speech, such as engaging in face-to-face discussions, *Hill v. Colorado*, 530 U.S. 703 (2000); or, (4) generally involves only a "time, place, and manner of expression," *Perry Educ.*, 460 U.S. at 45.

Inc. v. Twp. of Willingboro, 431 U.S. 85 (1977). And it has concluded that bans "engag[ing] in editorializing" in public broadcasting are content-based restrictions on speech. *FCC v. League of Women Voters of California*, 468 U.S. 364, 366, 383 (1984).

Most relevant here, this Court has repeatedly held that a law that disfavors speech based upon the subject matter being discussed is always a content-based restriction and therefore presumptively unconstitutional. For example, in *Police Department of Chicago v. Mosley*, 408 U.S. 92 (1972), a city enacted an ordinance prohibiting picketing near schools, but exempted labor protests from that ban. This Court held that placing a special burden on discussion of some topics (non-labor issues) but not others (labor issues) was unlawful because the ordinance "describes permissible picketing in terms of its subject matter." *Id.* at 95. Similarly, in *Carey v. Brown*, 447 U.S. 455 (1980), this Court invalidated as content-based a law forbidding picketing of all "residence or dwellings," but exempting labor protests. *Id.* at 457, 460–61. This Court explained the law was content-based because, *inter alia*, the law impermissibly "presupposes that labor picketing is more deserving of First Amendment protection than are public protests over other issues." *Id.* at 462, 466. In short, "the statute discriminates among pickets based on the subject matter." *Id.* at 471. Finally, in *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987), this Court held unlawful a statute imposing a higher tax on general interest

magazines than upon "religious, professional, trade, or sports periodical[s]," reasoning that the "tax status [of the magazine] depends entirely on its *content*." *Id.* at 226, 229 (emphasis in original). As one commentator has summarized, this Court's "cases reveal a stable rule that laws that facially regulate expression on the basis of subject matter are content based." Leslie Kendrick, *Content Discrimination Revisited*, 98 Va. L. Rev. 231, 254 (2012).

The facts of the present case demonstrate the wisdom of this Court's long-standing rule that the First Amendment requires close scrutiny of laws favoring speech on some subjects over speech on other subjects. The Town of Gilbert's sign code permits ideological and political signs to be substantial larger, placed at more places, and hung longer than signs conveying the time and location of events such as religious services. As Judge Watford explained in dissent below, the Town's sign ordinance is thus based upon the "apparent determination that 'ideological' and 'political' speech is categorically more valuable, and therefore entitled to greater protection from regulation, than speech promoting events sponsored by non-profit organizations." *Reed v. Town of Gilbert*, 707 F. 3d 1057, 1080 (9th Cir. 2013) (Watford, J., dissenting). This subject-matter discrimination impermissibly "presupposes that [public discussion of some issues] is more deserving of First Amendment protection than are [public discussion] over other issues." *Carey*, 447 U.S. at 466. There are, after all, valid

reasons to think that a sign directing the public to a meeting at which spiritual matters will be discussed is at least equally valuable to both speakers and listeners than a sign containing only a candidate's name and prospective office. The First Amendment prohibits a government from making the contrary value judgment by favoring some subjects of speech—be it labor (*Mosley*, *Casey*), sports (*Arkansas Writers*), or politics (this case)—over other subjects. Such discrimination, this Court has held, is plainly content-based and therefore presumptively unconstitutional.

II. WHEN A LAW'S PLAIN TEXT DISCRIMINATES AGAINST SPEECH BASED UPON ITS CONTENT, THE GOVERNMENT'S ALLEGEDLY BENIGN MOTIVE FOR ENACTING THE LAW IS LEGALLY IRRELEVANT

The Ninth Circuit acknowledged that the sign code required "consider[ing] the substance of [each] sign" to distinguish between the three subject-matter categories (Temporary Directional Signs, Ideological Signs, and Political Signs), but nevertheless concluded that the law was content-neutral. *Reed*, 707 F. 3d at 1069. The court determined to follow "a more nuanced standard" involving an inquiry into the government's "justifi[cations]" for the law. *Id.* at 1068 (quotations omitted). Applying that test, the court found the sign code was not content-based because the town "did not adopt its regulation of

speech because it disagreed with the message conveyed." *Id.* at 1071.

A. The Ninth Circuit's reliance on a government's subjective motivation to save a facially content-based law cannot be squared with this Court's precedent. This Court has long articulated the "commonsense understanding" that a law that is content-based on its text cannot be salvaged by either a legislature's allegedly non-censorial motivation or a government's proffer of "*justification* for the regulation [that] is content neutral." *City of Cincinnati v. Discovery Network*, Inc., 507 U.S. 410, 429 (1993) (emphasis in original). Put another way, "whether a statute is content neutral or content based is something that can be determined on the face of it; if the statute describes speech by content then it is content based." *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 448 (2002) (Kennedy, J., concurring); *see also McCullen v. Coakley*, 134 S. Ct. 2518, 2531 (2014) (noting that a statute is "content based if it require[s] enforcement authorities to examine the content of the message that is conveyed" (quotations omitted)).

All three of this Court's subject-matter discrimination cases, discussed above, reflect this understanding. In *Mosley*, the city claimed that its regulation of non-labor picketing was motivated not by "improper content censorship," but rather by a desire to preserve public order near its schools. *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 99 (1972). This Court rejected the relevance of that assertion, noting that upholding laws merely because

the government claims a non-censorial motivation would place "[f]reedom of expression on a soft foundation indeed." *Id.* at 101. In *Carey*, this Court similarly turned aside the government's claim that its ban on non-labor picketing near residences was justified by the non-discriminatory purpose of protecting residential privacy. *Carey v. Brown*, 447 U.S. 455, 465 (1980). And in *Arkansas Writers*, this Court held that it does not matter to the First Amendment analysis that a citizen subject to a discriminatory law can show "no evidence of an improper censorial motive." *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 228 (1987).

Other cases of this Court have articulated the same principle, holding that an allegedly benign motive does not render an otherwise content-based restriction content-neutral. *See, e.g., Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 592 (1983) ("Illicit legislative intent is not the *sine qua non* of a violation of the First Amendment."); *Discovery Network*, 507 U.S. at 429 ("True, there is no evidence that the city has acted with animus toward the ideas contained within respondents' publications, but just last Term we expressly rejected the argument that 'discriminatory treatment is suspect under the First Amendment only when the legislature intends to suppress certain ideas.'" (quoting *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 117 (1991))).

B. The Ninth Circuit's approach to determining whether a law is content-based, and therefore subject to strict scrutiny, also fails to give full meaning to the First Amendment's broad protections. The Ninth Circuit's reasoning—and that of other courts of appeals that have adopted a similar approach—is grounded in the narrow conception that the First Amendment protects only against *viewpoint* discrimination and censorial motives. Thus, in *Brown v. Town of Cary*, 706 F.3d 294 (4th Cir. 2013), the Fourth Circuit refused to apply strict scrutiny to every content-based restriction on speech because it believed such scrutiny should be reserved for laws with "a censorial purpose." *Id.* at 302. Or, as the Ninth Circuit explained here, strict scrutiny was not appropriate since the town "did not adopt its regulation of speech because it disagreed with the message conveyed." *Reed*, 707 F.3d at 1071.

This anti-censorial view of the First Amendment gives an unduly miserly construction to the Amendment's protections. On its face, the First Amendment's protection of speech is far broader: it generally safeguards an individual from burdens on the right to speak freely. And when a legislature limits the right to speak because speakers have decided to discuss a particular subject, the burden on First Amendment rights is the same regardless of whether the legislature has a subjective, censorial motivation. The method of determining if a law is content-based should not focus, therefore, on whether there are ostensibly-benign motives for that law.

This Court has rightly rejected the "distinction between content and viewpoint restrictions" in deciding whether restrictions on certain subjects of speech are constitutional. *Arkansas Writers*, 481 U.S. at 230. Instead, this Court has held that the First Amendment requires a government to treat all subjects that individuals want to discuss equally. The government may not enact restrictions based upon the theory that some topics are "more deserving of First Amendment protection," even where the government has no censorial purpose in terms of favoring any particular viewpoint on any particular topic. *Carey*, 447 U.S. at 466. And if the government thereafter wishes to defend its actions by asserting a non-discriminatory justification, that reason must be tested under strict scrutiny. It must prove objectively—not subjectively—that the content-based discrimination is "necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983); *see, e.g.*, *Arkansas Writers*, 481 U.S. at 231.

C. Finally, the Ninth Circuit's approach to content-based laws poses a threat to the integrity of the lawmaking process. Lawmaking in this country ordinarily culminates in the text voted upon by the lawmaking body, and it is the text that becomes binding law after all legally required prerequisites are satisfied. Legislatures and city councils create laws not through debates and speculation but through voting on specific words with specific meanings. That is why courts "do not inquire what

the legislature meant; [they] ask only what the statute means." Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 Harv. L. Rev. 417, 419 (1899). As this Court has long held, "[i]nquiries into [legislative] motives or purposes are a hazardous matter." *United States v. O'Brien*, 391 U.S. 367, 383 (1968); *accord Fletcher v. Peck*, 10 U.S. 87, 6 Cranch 87, 130 (1810).

The Ninth Circuit's methodology would encourage a disconnect between the deliberative process and the laws ultimately passed. The Ninth Circuit would require courts to "plunge[] into the morass of legislative motive, a notoriously hazardous and indeterminate inquiry," any time a law is content-discriminatory on its face. *Boos v. Barry*, 485 U.S. 312, 336 (Brennan, J., concurring). Recognizing this, savvy lawmakers could use legislative records to paper over and push through all manner of onerous and discriminatory speech-burdening laws that might not pass if judged by their text alone.[3]

---

[3] Whether the same concerns apply to the opposite rule—under which proof of an improper legislative purpose would invalidate a textually content-neutral law—is not presented here. *See, e.g.*, *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2664 (2011) ("A government bent on frustrating an impending demonstration might pass a law demanding two years' notice before the issuance of parade permits. Even if the hypothetical measure on its face appeared neutral as to content and speaker, its purpose to suppress speech and its unjustified burdens on expression would render it unconstitutional.").

What is more, the Ninth Circuit has extended this same flawed reasoning beyond the First Amendment context. For example, that court has also held that under the Dormant Commerce Clause, state laws that discriminate by their plain text against interstate commerce are nevertheless not subject to strict scrutiny if the state had "good and non-discriminatory reason[s]" for enacting the laws. *See Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070, 1107 (9th Cir. 2013). In that context, as here, the Ninth Circuit's view is at odds with longstanding precedent of this Court. *See Or. Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, 100 (1994) (the "purpose of, or justification for, a law has no bearing on whether it is facially discriminatory").

It would thus be beneficial for this Court to make clear that the assertion of a subjectively non-discriminatory reason can never save from invalidation any statute that is discriminatory on its text, in any area of constitutional law. In general, such a discriminatory statute can only be salvaged by a showing of objective justifications and sufficient fit, under the level of scrutiny that this Court has held applies to the discriminatory treatment at issue. In the First Amendment context, the proper analysis is to evaluate the law on its text to decide whether the law is a content-based regulation of speech. If that law is content-based by its text, the law is "presumptively invalid," *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 382 (1992), and can only survive review if the State demonstrates through objective evidence and argumentation that the law is

"necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Perry Educ.*, 460 U.S. at 45. This straightforward approach "provides clear guidance" about "the scope of impermissible regulation" and individuals' "constitutional protection." *Boos*, 485 U.S. at 336 (Brennan, J., concurring).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

Patrick Morrisey
Attorney General

Elbert Lin
Solicitor General
Counsel of Record

Misha Tseytlin
Deputy Attorney General

Julie Marie Blake
J. Zak Ritchie
Assistant Attorneys General

OFFICE OF THE ATTORNEY GENERAL
State Capitol
Building 1, Room E-26
Charleston, WV 25305
EL@wvago.gov
(304) 558-2021

Attorneys for Amicus Curiae
State of West Virginia

SEPTEMBER 22, 2014

Samuel S. Olens
Attorney General
State of Georgia

E. Scott Pruitt
Attorney General
State of Oklahoma

Derek Schmidt
Attorney General
State of Kansas

Alan Wilson
Attorney General
State of South Carolina

Bill Schuette
Attorney General
State of Michigan

Greg Abbott
Attorney General
State of Texas

Timothy C. Fox
Attorney General
State of Montana

Sean D. Reyes
Attorney General
State of Utah

Jon Bruning
Attorney General
State of Nebraska

AMICUS CURIAE BRIEF

RECORD & BRIEFS

No. 13-502

Supreme Court, U.S.
FILED
SEP 22 2014
OFFICE OF THE CLERK

In The
Supreme Court of the United States

CLYDE REED, ET AL.,

Petitioners,

v.

TOWN OF GILBERT, ARIZONA, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF ROBERT WILSON, KELLY DICKINSON, JIM ROOS, KIM HOUGHTON, BILL MAIN, TONIA EDWARDS, CANDANCE KAGAN, MARY LACOSTE, JOYCELYN COLE, AND ANNETTE WATT AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INSTITUTE FOR JUSTICE
WILLIAM H. MELLOR
ROBERT P. FROMMER*
ERICA J. SMITH
901 North Glebe Road, Suite 900
Arlington, VA 22203
Tel: (703) 682-9320
E-mail: wmellor@ij.org,
rfrommer@ij.org,
esmith@ij.org
*Counsel of Record

Counsel for Amici Curiae

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

Library of Congress
Law Library

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF THE *AMICI* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. The History Behind the Court's Fractured First Amendment Doctrine 7

A. The Traditional Approach: Laws That Turn on a Speaker's Message or Subject Matter Are Content-Based 9

B. The *Renton* Approach: Laws That Are Adopted for Censorial Ends Are Content-Based 13

II. Exclusive Use of the *Renton* Approach by Some Lower Courts Has Led to Confusion and Deep Splits in a Wide Variety of First Amendment Areas 17

A. As This Case Demonstrates, Federal and State Courts Are Split on Whether Sign Ordinances That Draw Subject-Matter Distinctions Are Content-Based 18

B. The Misapplication of Established First Amendment Doctrine Has Created Confusion in Other Areas 26

1. Occupational Speech 26

2. Panhandling Bans 29

3. Noise Ordinances 30

TABLE OF CONTENTS – Continued

Page

III. To End This Widespread Confusion, the Court Should Make Clear That There Are Two Tests for Determining Whether a Law Is Content-Based and That Courts Must Apply Them Both When Analyzing Speech Restrictions 31

CONCLUSION..... 34

TABLE OF AUTHORITIES

Page

CASES

Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221 (1987) 3, 12

Boos v. Barry, 485 U.S. 312 (1988) 15

Brown v. Town of Cary, 706 F.3d 294 (4th Cir. 2013) 6

Central Radio Co. v. City of Norfolk, No. 2:12-cv-00247 (E.D. Va. May 15, 2013) 1, 4, 24, 25, 26

City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410 (1993) 29

City of Renton v. Playtime Theaters, Inc., 475 U.S. 41 (1986) 13, 14, 15, 16, 17

City of Tipp City v. Dakin, 929 N.E.2d 484 (Ohio Ct. App. 2010) 19

Collier v. City of Tacoma, 854 P.2d 1046 (Wash. 1993) 19

Consolidated Edison Co. v. Public Service Commission, 447 U.S. 530 (1980) 5

Edwards v. District of Columbia, 755 F.3d 996 (D.C. Cir. 2014) 28

Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975) 11, 12, 13

Fowler v. Rhode Island, 345 U.S. 67 (1953) 9

Goward v. City of Minneapolis, 456 N.W.2d 460 (Minn. Ct. App. 1990) 19

TABLE OF AUTHORITIES – Continued

Page

Gresham v. Peterson, 225 F.3d 899 (7th Cir. 2000) 29

H.D.V.-Greektown, LLC v. City of Detroit, 568 F.3d 609 (6th Cir. 2009) 18

Hill v. Colorado, 530 U.S. 703 (2000) ...6, 17, 18, 26, 29

Holder v. Humanitarian Law Project, 561 U.S. 1 (2010).....27, 31

Kagan v. City of New Orleans, 753 F.3d 560 (5th Cir. 2014) 27, 28

Kagan v. City of New Orleans, 957 F. Supp. 2d 774 (E.D. La. 2013) 28

Katz v. United States, 389 U.S. 347 (1967).....32, 33

Kovacs v. Cooper, 336 U.S. 77 (1949).....8, 30

Kyllo v. United States, 533 U.S. 27 (2001).....32

Matthews v. Town of Needham, 764 F.2d 58 (1st Cir. 1985) 18, 21

Melrose, Inc. v. City of Pittsburgh, 613 F.3d 380 (3d Cir. 2010).....18

Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue, 460 U.S. 575 (1983).....12

National Advertising Co. v. Town of Babylon, 900 F.2d 551 (2d Cir. 1990).....18, 21

Neighborhood Enterprises, Inc. v. City of St. Louis, No. 4:07-cv-01546 (E.D. Mo. Mar. 16, 2009) 24

TABLE OF AUTHORITIES – Continued

Page

Neighborhood Enterprises, Inc. v. City of St. Louis, 644 F.3d 728 (8th Cir. 2011).....1, 20, 21, 24

New York Times Co. v. Sullivan, 376 U.S. 254 (1964).....10

Niemotko v. Maryland, 340 U.S. 268 (1951).....9

People v. Jones, 721 N.E.2d 546 (Ill. 1999).....30

PKO Ventures, LLC v. Norfolk Redevelopment & Housing Authority, 747 S.E.2d 826 (Va. 2013).....25

Police Department of Chicago v. Mosley, 408 U.S. 92 (1972).....*passim*

Rappa v. New Castle County, 18 F.3d 1083 (3d Cir. 1994).....19

Riley v. National Federation of the Blind, 487 U.S. 781 (1988).....26

Sackllah Investments, LLC v. Charter Township of Northville, No. 293709, 2011 Mich. App. LEXIS 1452 (Mich. Ct. App. Aug. 9, 2011).....19

Saia v. New York, 334 U.S. 558 (1948).....8

Scadron v. City of Des Plaines, 734 F. Supp. 1437 (N.D. Ill. 1990), *aff'd*, No. 91-1083, 1993 U.S. App. LEXIS 4694 (7th Cir. Mar. 8, 1993).....18

Solantic, LLC v. City of Neptune Beach, 410 F.3d 1250 (11th Cir. 2005).....18, 21

TABLE OF AUTHORITIES – Continued

Page

State v. Boehler, 262 P.3d 637 (Ariz. Ct. App. 2011) 29

State v. Brownfield, No. CA2012-03-065, 2013-Ohio-1947 (Ohio Ct. App. May 13, 2013) 30

State v. Catalano, 104 So. 3d 1069 (Fla. 2012).....30

State v. DeAngelo, 963 A.2d 1200 (N.J. 2009).....19

Texas Department of Transportation v. Barber, 111 S.W.3d 86 (Tex. 2003) 19

Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622 (1994).....31

Union City Board of Zoning Appeals v. Justice Outdoor Displays, Inc., 467 S.E.2d 875 (Ga. 1996).....19

United States v. Jones, 132 S. Ct. 945 (2012).....6, 31, 33

United States v. Knotts, 460 U.S. 276 (1983).....32

United States v. Maynard, 615 F.3d 544 (D.C. Cir. 2010).....32

United States v. Pineda-Moreno, 591 F.3d 1212 (9th Cir. 2010) 33

United States v. Stevens, 559 U.S. 460 (2010).....31

Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976).....14

Wag More Dogs, LLC v. Cozart, 680 F.3d 359 (4th Cir. 2012) 1, 18, 22

TABLE OF AUTHORITIES – Continued

Page

Wagner v. City of Garfield Heights, No. 13-3474, 2014 U.S. App. LEXIS 15984 (6th Cir. Aug. 19, 2014) 24, 25

Ward v. Rock Against Racism, 491 U.S. 781 (1989) .....*passim*

Young v. American Mini Theatres, 427 U.S. 50 (1976) 13, 14

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. I .....*passim*

U.S. Const. amend. IV .....*passim*

OTHER PUBLICATIONS

Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. Chi. L. Rev. 413 (1996) 2

Geoffrey Stone, *Content-Neutral Restrictions*, 54 U. Chi. L. Rev. 46 (1987) 14

Laurence H. Tribe, *American Constitutional Law* § 12-19 (2d ed. 1988) 14

R. George Wright, *Content-Based and Content-Neutral Regulation of Speech: The Limitations of a Common Distinction*, 60 U. Miami L. Rev. 333 (2006) 16

Robert Patrick, *U.S. Supreme Court declines to review St. Louis eminent domain sign case*, St. Louis Post-Dispatch (Feb. 21, 2012) 19

INTEREST OF THE *AMICI*

The Institute for Justice is a nonprofit, public-interest law firm dedicated to defending the essential foundations of a free society, including freedom of speech and the free exchange of ideas. *Amici* are ten Institute for Justice clients who have challenged state and local laws that suppressed their speech under the First Amendment. Although four of these clients have challenged sign codes similar to the one at issue in this case – *Neighborhood Enterprises, Inc. v. City of St. Louis*, 644 F.3d 728 (8th Cir. 2011) (Jim Roos); *Wag More Dogs, LLC v. Cozart*, 680 F.3d 359 (4th Cir. 2012) (Kim Houghton); *Central Radio Co. v. City of Norfolk*, No. 2:12-cv-00247, slip op. at 2, 10-11 (E.D. Va. May 15, 2013) (Robert Wilson and Kelly Dickinson) – all ten *amici* have had to litigate whether the laws restricting their speech should be viewed as content-based or content-neutral.[1]

Amici's experiences show how the Court's differing tests for whether a law is content-based have sown rampant confusion in lower courts. Under this Court's precedents, a law is content-based *either* (1) if it requires the government to look at the content of one's speech in determining whether or not it is subject to regulation, *or* (2) when the purpose behind

---

[1] All parties have consented to the filing of this brief. *Amici* affirm that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

a facially neutral law is to disapprove or discourage messages on a certain subject matter or viewpoint. But in every case brought by *amici*, the government has argued that its facially discriminatory speech restriction was not content-based because it did not enact the law for censorial purposes. And when *amici*'s First Amendment challenges have failed, it is often because the reviewing court refrained from looking at the law's terms and instead focused only on the government's professed motives. It is *amici*'s hope that the breadth of their experiences will lead this Court to issue a comprehensive ruling that resolves this crucially important aspect of First Amendment doctrine.

SUMMARY OF ARGUMENT

"The distinction between content-based and content-neutral regulations of speech serves as the keystone of First Amendment law." Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. Chi. L. Rev. 413, 443 (1996). But that distinction is now horribly muddled due to confusion caused by conflicting language in this Court's free-speech cases. Lower courts, in attempting to navigate that confusion, have profoundly weakened speech protections for a broad class of would-be speakers.

Traditionally, a law was content-based if officials had to inspect the actual message to determine how it could be regulated. *See, e.g.*, *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95, 99 (1972) (holding law content-based because it required officials to scrutinize protest to determine if it involved a labor dispute); *Ark. Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 228 (1987) (holding that sales-tax exemption for certain categories of publications was content-based despite "no evidence of an improper censorial motive"). But beginning with *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), the Court injected a second test that asked if the government enacted the law to squelch speech or to instead further some other non-speech related interest. The problem is that although legislative purpose is *one* way for courts to decide if a law is content-based, some lower courts began to treat it as the *only* way. As a result, those courts have held that facially discriminatory laws are subject to strict scrutiny only if they regulate speech for explicitly censorial reasons.

Amici are entrepreneurs and small business owners who have each challenged facially discriminatory speech restrictions. Government officials said that the murals and protest banners of *amici* Jim Roos, Kim Houghton, Bob Wilson, and Kelly Dickinson violated their jurisdictions' sign codes, although those codes would have allowed identically-sized signs that depicted something else. Although the Eighth Circuit held that the sign code in Roos' case was content-based, the Fourth Circuit held that a

functionally identical sign code used against Houghton was content-neutral because the government's professed purpose was maintaining traffic safety rather than suppressing speech.[2] Likewise, *amici* Tonia Edwards, Bill Main, Candance Kagan, Mary LaCoste, Joycelyn Cole, and Annette Watt are all tour guides who challenged laws that required them to get the government's permission to speak about their cities' historical landmarks, even though those laws would let them speak about other subjects with impunity. Although the D.C. Circuit struck down the law that Edwards and Main challenged, three weeks earlier the Fifth Circuit upheld a nearly identical New Orleans law after holding it was content-neutral since its purpose was to protect the city's tourism industry.

Amici's experiences show how some lower courts' exclusive focus on legislative purpose has gravely weakened First Amendment protections for a wide class of would-be speakers. Just as the problems caused by this exclusive focus have been manifestly broad, so too should be this Court's response. Rather than treating this case narrowly as one concerned only with "signs," the Court should take this

---

[2] The Eastern District of Virginia granted summary judgment to Norfolk against *amici* Wilson and Dickinson's challenge to the city's sign code, largely based on the Fourth Circuit's opinion in *amicus* Houghton's case. *Central Radio Co. v. City of Norfolk*, No. 2:12-cv-00247, slip op. at 2, 10-11 (E.D. Va. May 15, 2013). Their case is now on appeal to the Fourth Circuit.

opportunity to declare, in broad doctrinal terms, that a speech restriction is content-based if *either* its purpose is to suppress the communicative impact of one's speech *or* it requires officials to inspect a message's subject to decide how it should be regulated. By making clear that there are two tests to determine if a law is content-based, and that lower courts should apply them both whenever they analyze a speech restriction, this Court can ensure that the government cannot insulate itself from heightened scrutiny while picking and choosing what messages may be shared.

ARGUMENT

This case provides the Court with the opportunity to bring clarity to one of the most fundamental issues in First Amendment jurisprudence. The Court's traditional test for whether a law is content-based asks if the law's text treats speakers differently based on what they wish to say. *See, e.g.*, *Consol. Edison Co. v. Pub. Serv. Comm'n*, 447 U.S. 530, 536-37 (1980). But in language arising from the "secondary effects" doctrine – first developed to address regulations of adult-themed businesses – this Court has said that the "government's purpose [in enacting a speech regulation] is the controlling consideration." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). As a result, this Court has sometimes held that a law is content-neutral even if it explicitly treats certain subjects more harshly than others.

See, e.g., *Hill v. Colorado*, 530 U.S. 703, 720-25 (2000) (holding that law making it illegal to approach someone to engage in "protest, education, or counseling," but not to discuss other matters, is content-neutral).

Some lower courts have been confused by this Court's twin tests for determining whether a law is content-based. As a result, they have held that laws that facially discriminate based on what a would-be speaker wishes to say are content-neutral. This occurs not only when courts evaluate sign codes, as the Ninth Circuit Court of Appeals did in this case, but when courts analyze a vast range of restrictions on noncommercial speech, such as occupational-speech licensing, panhandling bans, and noise ordinances. The exclusive use of this purpose-based test often short-circuits the heavy scrutiny courts should employ in construing facially discriminatory speech restrictions. *See, e.g.*, *Brown v. Town of Cary*, 706 F.3d 294, 303 (4th Cir. 2013) (stating that "we have not hesitated to deem [a] regulation content neutral even if it facially differentiates between types of speech" in upholding sign code that restricted display of political protest sign but exempted "public art" from regulation).

Two years ago this Court reminded lower courts that it had two separate tests for whether a Fourth Amendment search had occurred. *United States v. Jones*, 132 S. Ct. 945, 950 (2012). This case provides the Court with an opportunity to do the same for the First Amendment. In Section I, *amici* explain the

history of this Court's First Amendment jurisprudence and how language from some of the Court's opinions has led some lower courts to view purpose as being the only touchstone for whether a law is content-based. In Section II, *amici* discuss the effect that the exclusive use of the purpose-based inquiry has had both in their own cases and throughout the First Amendment. Finally, in Section III, *amici* ask that the Court use this opportunity not just to correct an error in sign law, but to remind lower courts more generally that a law should be treated as content-based and therefore subject to strict scrutiny *either* (1) if it requires the government to look at the content of one's speech in determining whether or not it is subject to regulation, *or* (2) when the purpose behind a facially neutral law is to disapprove or discourage messages on a certain subject matter or viewpoint. Only this two-part inquiry will protect against the erosion of First Amendment rights that the exclusive invocation of *Ward*'s purpose-based inquiry has engendered.

I. The History Behind the Court's Fractured First Amendment Doctrine.

The Supreme Court's free-speech jurisprudence has shifted over the past century. Originally, the Court decided cases on an ad hoc basis, with the justices each making their own independent determinations about whether a speech restriction was constitutional. But over time, the Court crystallized

its analysis to make clear that a speech restriction is subject to strict scrutiny if it (1) requires the government to look at the content of one's speech in determining whether or not it is subject to regulation, or (2) has the manifest purpose of regulating speech for censorial reasons.

Until the middle of the twentieth century, the Supreme Court analyzed alleged free-speech violations on a case-by-case basis. In *Kovacs v. Cooper*, 336 U.S. 77, 78 (1949), for instance, the Court upheld a Trenton, New Jersey law that made it illegal "to play, use or operate a sound truck, loud speaker or sound amplifier which emits therefrom loud and raucous noises." The majority in *Kovacs* did not ask if Trenton's law was content-based or content-neutral; such terminology had not yet been developed. But the germ of the distinction was there: In upholding Trenton's law in *Kovacs*, the Court distinguished *Saia v. New York*, 334 U.S. 558 (1948), where it struck down a sound-truck ban that exempted "items of news and matters of public concern," out of concern that that law in *Saia* granted the government discretion to decide who may and may not speak. 336 U.S. at 82-83. *Kovacs* and *Saia* demonstrate that, even early on, the Court was concerned that laws exempting certain subject matters from an otherwise general prohibition give government officials power to decide

who can speak and are anathema to the First Amendment.[3]

But divining these themes through exegesis of this Court's decisions was imperfect at best. What was needed was for the Court to develop a cohesive rule of law, a theoretical framework to guide both lawmakers, would-be speakers, and inferior courts, which often struggled to apply the Court's free-speech decisions to new fact patterns. Thankfully, changes to the Court's First Amendment jurisprudence soon addressed these concerns.

A. The Traditional Approach: Laws That Turn on a Speaker's Message or Subject Matter Are Content-Based.

The unpredictability of this ad hoc approach led the Court to formalize its First Amendment jurisprudence. The Court's concern was that by enacting speech restrictions that exempted certain subjects or topics, government officials could interject themselves as censors. Thus, the Court's inquiry focused on whether a law's terms applied across the board or

---

[3] *See also Niemotko v. Maryland*, 340 U.S. 268 (1951) (invalidating disorderly-conduct convictions of Jehovah's Witness who spoke without first obtaining permit that official had discretion to approve or deny); *Fowler v. Rhode Island*, 345 U.S. 67 (1953) (reversing conviction of Jehovah's Witness for addressing a "religious meeting in any public park" where officials acknowledged allowing Catholics and Protestants to conduct religious services in park).

instead required officials to inspect speech to determine how it should be regulated. If a law treated some messages more harshly than others, the Court required a more probing review than for a law that did not differentiate based on subject matter.

The first major case to focus on subject-matter restrictions was *Police Department of Chicago v. Mosley*, 408 U.S. 92 (1972), which concerned a Chicago ordinance that barred picketing within 150 feet of schools during the school day – except for picketing related to labor disputes. The Supreme Court found that the ordinance expressly "describes permissible picketing in terms of its subject matter" and therefore controlled the range of what could be discussed. *Id.* at 95. Content control, said the Court, was nothing more than "forbidden censorship" that, left unchecked, would "completely undercut the 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open.'" *Id.* at 96 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)). Accordingly, the ordinance's content-based distinction could survive only if it was "tailored to serve a substantial government interest." *Id.* at 99.[4] Chicago had no

---

[4] Interestingly, the *Mosley* court's description of strict scrutiny comes from its equal-protection jurisprudence, which imposes different tiers of scrutiny based on whether the law accomplishes its objective by treating different racial or ethnic groups differently. Indeed, the Court's decision in *Mosley* technically rests upon the Equal Protection Clause. 408 U.S. at

(Continued on following page)

evidence that labor picketing was less likely to be disruptive than other forms of picketing, and the Court concluded that to accept such a claim based on broad generalities would leave "[f]reedom of expression on a soft foundation indeed." *Id.* at 101. It therefore declared the city's content-based picketing ordinance unconstitutional. *Id.* at 102.

The Court refined this analysis in *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975), where it reviewed an ordinance banning nudity on drive-in theater screens. Distilling the lessons of *Mosley* and other cases, the Court explained that while the government may enact "reasonable time, place, and manner regulations applicable to all speech irrespective of content," the First Amendment strictly limits the government's power to act as a censor and shield "the public from some kinds of speech on the ground that they are more offensive than others." *Id.* at 209. The Court held that Jacksonville's law was content-based because it prevented "drive-in theaters from showing movies containing any nudity, however innocent or even educational." *Id.* at 211-12. Striking down the law, the Court concluded that while Jacksonville's purposes for the law were legitimate, even laudatory, *see id.* at 217, it could not pursue those legislative goals in a content-based manner. *Id.* at 212 (noting that Jacksonville's ban on nudity reached

---

102 (holding that "under the Equal Protection Clause, [Chicago's picketing ordinance] may not stand").

farther than necessary to protect children and that adults could avoid nudity by averting their eyes).

Mosley, *Erznoznik*, and later cases make clear that content-based laws are constitutionally suspect and must survive heightened scrutiny (whether termed as "exacting," "careful," or "strict") even if the government's purpose in enacting the law was something other than censorship. In *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983), and *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 228 (1987), the Court said as much when it explained that "[i]llicit legislative intent is not the *sine qua non* of a violation of the First Amendment." *Minneapolis Star*, 460 U.S. at 592. In both *Minneapolis Star* and *Arkansas Writers' Project*, this Court struck down use and sales taxes that applied only to certain publications based on their circulation or subject matter. No one claimed that the goal of the tax regimes was to silence certain disfavored speakers, but that did not matter, as the Court held that there was no need to adduce evidence of "an improper censorial motive." *Arkansas Writers' Project*, 481 U.S. at 228. All that mattered was that the laws burdened only certain speakers and, in the case of *Arkansas Writers' Project*, required government officials to "examine the content of the message that is conveyed" to decide if it could be taxed. *Id.* at 230 (internal citation omitted). That was enough for each law to be subject to strict scrutiny.

B. The *Renton* Approach: Laws That Are Adopted for Censorial Ends Are Content-Based.

At the same time that this Court formalized its traditional test for whether a law is content-based, it began to review First Amendment challenges to local zoning rules concerning adult businesses, including adult movie theaters and strip clubs. Under the traditional test laid out in *Mosley* and *Erznoznik*, these rules were clearly content-based in that they only applied to businesses that spoke on a particular subject.

But a plurality instead held that they were content-neutral under the newly developed "secondary effects" doctrine. In *Young v. American Mini Theatres*, 427 U.S. 50 (1976), the Court reviewed a Detroit ordinance prohibiting adult theaters from being within 1000 feet of any two other "regulated uses." *Id.* at 52. Whether a business was an adult theater turned on the types of films it showed. *Id.* at 53. Despite that, four justices held that the ordinance was not content-based. Rejecting *Mosley*'s statement that "[s]elective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone," 408 U.S. at 95-96, the plurality said that "[t]his statement read literally would absolutely preclude any regulation of expressive activity predicated in whole or in part on the content of the communication." *Young*, 427 U.S. at 65. Because the four justices felt that the ordinance's purpose was to alleviate the secondary

effects that Detroit said surrounded adult theaters, rather than to suppress the theaters' speech, they held it to be constitutional. *Id.* at 70-71 & n.34.

Ten years later, the Court in *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986) embraced *Young* and the secondary-effects doctrine. Renton claimed that it passed its ordinance not to squelch speech, but to ameliorate certain undesirable side effects of that speech, and the Court concluded that it was content-neutral because it was "*justified* without reference to the content of the regulated speech." *Id.* at 48 (quoting *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976)). *Renton* was deeply divisive, both within the Court and with First Amendment scholars. In dissent, Justice Brennan argued that although theaters' secondary effects might be a reason to regulate them, a regulation's stated purpose cannot turn a content-based law into a content-neutral one. *Id.* at 56-57 (Brennan, J., dissenting). Brennan consoled himself that the doctrine had only been applied in the adult-zoning context, but commentators feared that if the secondary-effects doctrine spread, it potentially could redraw the Court's entire content-based/content-neutral framework and "gravely erode the First Amendment's protections." Laurence H. Tribe, *American Constitutional Law* § 12-19, at 952 (2d ed. 1988); *see also* Geoffrey Stone, *Content-Neutral Restrictions*, 54 U. Chi. L. Rev. 46, 116 (1987) (stating that the secondary-effects doctrine "threatens to undermine

the very foundation of the content-based/content-neutral distinction").

The commentators' fears were well-founded. Barely two years after the Court decided *Renton*, the secondary-effects doctrine arose in a case having nothing to do with adult entertainment. In *Boos v. Barry*, 485 U.S. 312 (1988), for instance, a plurality cited *Renton* in implicitly accepting the validity of the secondary-effects doctrine outside the adult-entertainment context. In ruling against the District of Columbia, though, the plurality distinguished *Renton* on the grounds that the District said the law's purpose was "to shield diplomats from speech that offends their dignity," *id.* at 320, which focused upon the "direct impact that speech has on its listeners." *Id.* at 321. Although agreeing with the plurality's holding, Justice Brennan chided them for their attempt to divine legislative motive, noting that "future litigants are unlikely to be so bold or so forthright" as the District. *Id.* at 335 (Brennan, J., concurring in the judgment).

Two years later, in *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), the Court inadvertently exacerbated the issue. By all accounts, the challenged rule in *Ward* – which required the use of city-provided sound equipment at concerts in Central Park – was content-neutral under *Mosley*'s traditional inquiry, as it applied regardless of what was being performed. *See* 491 U.S. at 792. But rather than apply that traditional test, the Court instead focused on legislative purpose, holding that "[t]he principal inquiry in

determining content neutrality is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. The *government's purpose* is the controlling consideration." *Id.* at 791 (internal citations omitted and emphasis added). *Ward* then cited *Renton* for the idea that "[a] regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Id.* Because the rule's purpose was to protect the tranquility of adjoining areas, the Court determined it was content-neutral. *Id.* at 792.

As Justice Marshall noted, *Ward* was "the first time [that] a majority of the Court applie[d] *Renton* analysis to a category of speech far afield from that decision's original limited focus." *Id.* at 804 n.1 (Marshall, J., dissenting). The dissenters in *Ward* feared that focusing on legislative purpose rather than a statute's plain language might "encourage widespread official censorship" by causing many facially discriminatory laws to be viewed as content-neutral. *Id.* Furthermore, some commentators noted that having two separate tests can cause confusion in lower courts, which increases the risk that courts will reach differing results in factually indistinguishable cases. *See* R. George Wright, *Content-Based and Content-Neutral Regulation of Speech: The Limitations of a Common Distinction*, 60 U. Miami L. Rev. 333, 339 (2006) (noting that lower courts "have made little progress in sorting out the respective roles of an

examination of the text of the speech regulation and of broader-ranging attempts to ascertain legislative intent in distinguishing between [content-based] and [content-neutral] regulations") (footnotes omitted). As *amici* show below, this is more than a risk: this Court's fractured approach to content neutrality has led some lower courts to believe that only legislative purpose matters, and that facially discriminatory laws can be scrutinized as content-neutral so long as the courts believe they were enacted for non-censorial reasons. The result has been to create deep splits in many different areas of First Amendment law.

II. Exclusive Use of the *Renton* Approach by Some Lower Courts Has Led to Confusion and Deep Splits in a Wide Variety of First Amendment Areas.

Due to the doctrinal confusion that *Renton*, *Ward*, and later cases like *Hill v. Colorado*, 530 U.S. 703 (2000), have engendered, lower courts have been left without any clear guidance on how they should determine whether any particular law is content-based. Some courts now view legislative purpose as not just one way to determine if a law is content-based, but the *only* way. The Ninth Circuit's opinion in this case is just one example of this blinkered view of First Amendment jurisprudence; *amici* have lived through several others. This long-existing circuit split has had real world consequences on *amici*'s and others ability to protest government abuse, support themselves, and express their values.

A. As This Case Demonstrates, Federal and State Courts Are Split on Whether Sign Ordinances That Draw Subject-Matter Distinctions Are Content-Based.

Whether individuals can use signs to effectively protest or promote a worldview should not depend on their address. Yet the content-based confusion discussed above is most evident in sign-code litigation. The Ninth Circuit's opinion in this case exemplifies the deep split amongst federal and state courts on whether sign ordinances that provide exemptions or otherwise draw distinctions based on subject matter are content-based.[5] This has led to *amici* litigating

---

[5] On one side of the circuit split, the First, Second, Eighth, and Eleventh Circuits use this Court's traditional approach to the content-based inquiry. *Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250, 1263-64 (11th Cir. 2005); *Nat'l Adver. Co. v. Town of Babylon*, 900 F.2d 551, 556-57 (2d Cir. 1990); *Matthews v. Town of Needham*, 764 F.2d 58, 60 (1st Cir. 1985). On the other side of the split are the Fourth, Sixth, and Seventh Circuits. They have held, based on this Court's statements in *Ward* and *Hill*, that an ordinance's exemptions for certain types of noncommercial signs will not render the sign code content-based so long as the government has proffered some content-neutral justification for the ordinance. *See, e.g.*, *Wag More Dogs, LLC v. Cozart*, 680 F.3d 359, 365 (4th Cir. 2012); *H.D.V.-Greektown, LLC v. City of Detroit*, 568 F.3d 609, 623-25 (6th Cir. 2009); *Scadron v. City of Des Plaines*, 734 F. Supp. 1437, 1445-46 (N.D. Ill. 1990), *aff'd*, No. 91-1083, 1993 U.S. App. LEXIS 4694, at *4 (7th Cir. Mar. 8, 1993) (unreported). Meanwhile, the Third Circuit employs its own "significant relationship" test, which falls more in the *Ward* camp. *See, e.g.*, *Melrose, Inc. v. City of*

(Continued on following page)

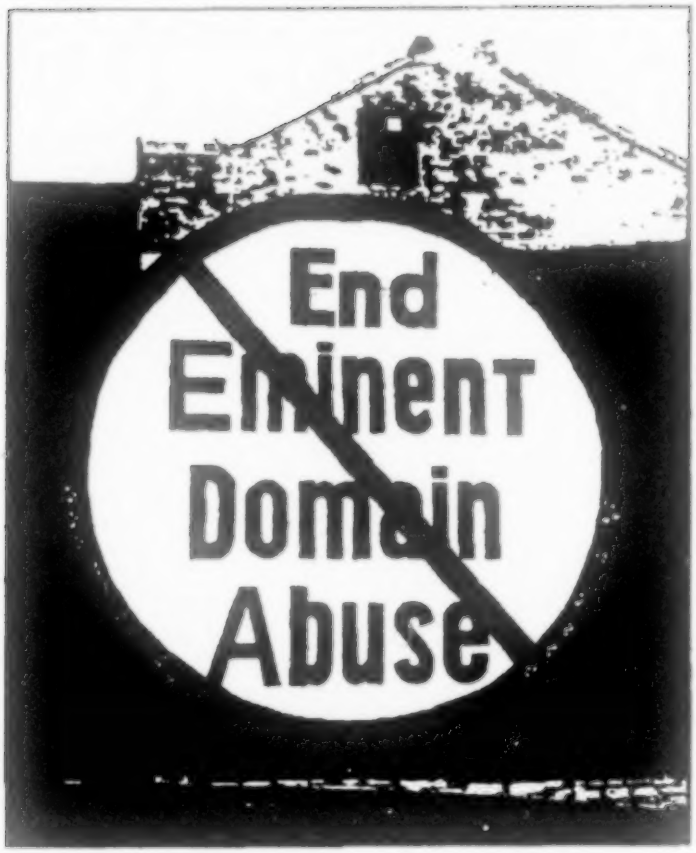
virtually identical sign-code disputes with vastly different results, depending on the jurisdiction.

Amicus Jim Roos was desperate to save his St. Louis-based non-profit, affordable housing organization, Sanctuary in the Ordinary, from eminent-domain abuse. The city had already seized several of Sanctuary's buildings for redevelopment, forcing dozens of Roos' needy clients out of their homes.[6] Now, it was coming for another one. Roos fought back by painting a prominent mural on the threatened building that said "End Eminent Domain Abuse."

Pittsburgh, 613 F.3d 380, 388-89 (3d Cir. 2010) (citing *Rappa v. New Castle Cnty.*, 18 F.3d 1083 (3d Cir. 1994)).

Not surprisingly, the fractured circuits have also affected the state courts. Courts in Georgia, Minnesota, New Jersey, Ohio, and Washington have followed the traditional approach. *Union City Bd. of Zoning Appeals v. Justice Outdoor Displays, Inc.*, 467 S.E.2d 875, 882 (Ga. 1996); *Goward v. City of Minneapolis*, 456 N.W.2d 460, 465 (Minn. Ct. App. 1990); *State v. DeAngelo*, 963 A.2d 1200, 1205-06 (N.J. 2009); *City of Tipp City v. Dakin*, 929 N.E.2d 484, 499 (Ohio Ct. App. 2010); *Collier v. City of Tacoma*, 854 P.2d 1046, 1053 (Wash. 1993). Courts in Michigan and Texas are on the opposing side. *Sackllah Invs., LLC v. Charter Twp. of Northville*, No. 293709, 2011 Mich. App. LEXIS 1452 (Mich. Ct. App. Aug. 9, 2011); *Tex. DOT v. Barber*, 111 S.W.3d 86, 94 (Tex. 2003).

[6] *See, e.g.*, Robert Patrick, *U.S. Supreme Court declines to review St. Louis eminent domain sign case*, St. Louis Post-Dispatch (Feb. 21, 2012), *available at* http://www.stltoday.com/news/local/metro/u-s-supreme-court-declines-to-review-st-louis-eminent/article_b14cd8e2-5ca7-11e1-9d22-001a4bcf6878.html.



Amicus Jim Roos' protest mural

The city immediately threatened Roos with fines, declaring the mural to be a "sign" under the law and then declaring that sign to be "illegal" because it lacked a permit and was too large under the zoning code. *Neighborhood Enterprises, Inc. v. City of St. Louis,* 644 F.3d 728, 731-32 (8th Cir. 2011). But had the mural instead depicted a "[n]ational, state, religious, fraternal, professional and civic symbol[ ] or crest[ ]," *id.* at 737 (internal citation omitted), the city would have exempted it from its definition of sign – and thus, from any regulation whatsoever. Roos argued that this disparate treatment rendered St. Louis' sign code content-based and, after years of litigation, he prevailed when the Eighth Circuit held

that the "zoning code's definition of 'sign' was impermissibly content-based because the message conveyed determines whether the speech is subject to the restriction." *Id.* (internal punctuation omitted).[7] Roos is still using his mural to fight the city's eminent-domain practices today.

Eight-hundred miles away, *amicus* Kim Houghton's mural did not share the same fate. Houghton is an entrepreneur who decided to leave her job at the Washington Post to open Wag More Dogs, a canine daycare, boarding, and grooming business in Arlington, Virginia. For Wag More Dogs' grand opening, Houghton painted the side of her building, which abutted the Shirlington dog park, with a whimsical mural of dogs, bones, and paw prints. But Arlington County considered the mural to be an oversized "sign," threatening Houghton with steep fines and prohibiting her from opening her business until she covered the mural with a tarp. Although the county's

---

[7] The Eighth Circuit's decision in *Neighborhood Enterprises* echoes earlier decisions from the First, Second, and Eleventh Circuits. *See Matthews v. Town of Needham*, 764 F.2d 58, 60 (1st Cir. 1985) (holding sign code to be content-based when it forbade political signs but permitted signs erected for charitable or religious causes); *Nat'l Adver. Co. v. Town of Babylon*, 900 F.2d 551, 556-57 (2d Cir. 1990) (holding that ordinance's exemption for signs "identifying a grand opening, parade, festival, fund drive or similar occasion" rendered it content-based); *Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250, 1263-64 (11th Cir. 2005) (concluding that sign code which exempted government flags and insignia of government, religious, charitable and fraternal organizations from regulation to be content-based).

sign code exempted "works of art" from the definition of sign – and thus, again, from any permitting requirement or size limits – the county zoning commissioner announced that the mural was not "art" because its subject matter was related to her business. *Wag More Dogs, LLC v. Cozart*, 680 F.3d 359, 363, 368 (4th Cir. 2012). Houghton sued, arguing in part that the "work of art" and other exemptions in the county's code rendered it content-based.

The Eastern District of Virginia dismissed Houghton's case, and the Fourth Circuit affirmed that dismissal. In so ruling, the Fourth Circuit stated that "a regulation [must] do more than merely differentiate based on content to qualify as content based." *Id.* at 365. Because the purpose for the county's sign code was traffic safety and aesthetics, the court held that it was content-neutral despite treating murals differently depending on what they depicted. After her loss, Houghton painted over the playing dogs with colorful birds lounging under a sunset. Despite being the exact same size and in the same exact location as the original mural, the new mural is legal under the code's art exemption because it shows birds instead of dogs.

Amicus Kim Houghton's original mural (illegal)

Amicus Kim Houghton's current mural (legal)

On the other side of the state, *amici* Bob Wilson and Kelly Dickinson are still fighting for the right to use their own property to protest eminent-domain abuse. Wilson and Dickinson are owners and officers of Central Radio Company, Inc., an 80-year-old family business based in Norfolk that services the Navy and other government agencies. In almost identical facts to *Neighborhood Enterprises,* a Norfolk agency wanted to seize Central Radio's property via eminent domain in order to build retail shops near Old Dominion University. *Central Radio Co. v. City of Norfolk*, No. 2:12-cv-00247, slip op. at 2, 10-11 (E.D. Va. May 15, 2013).

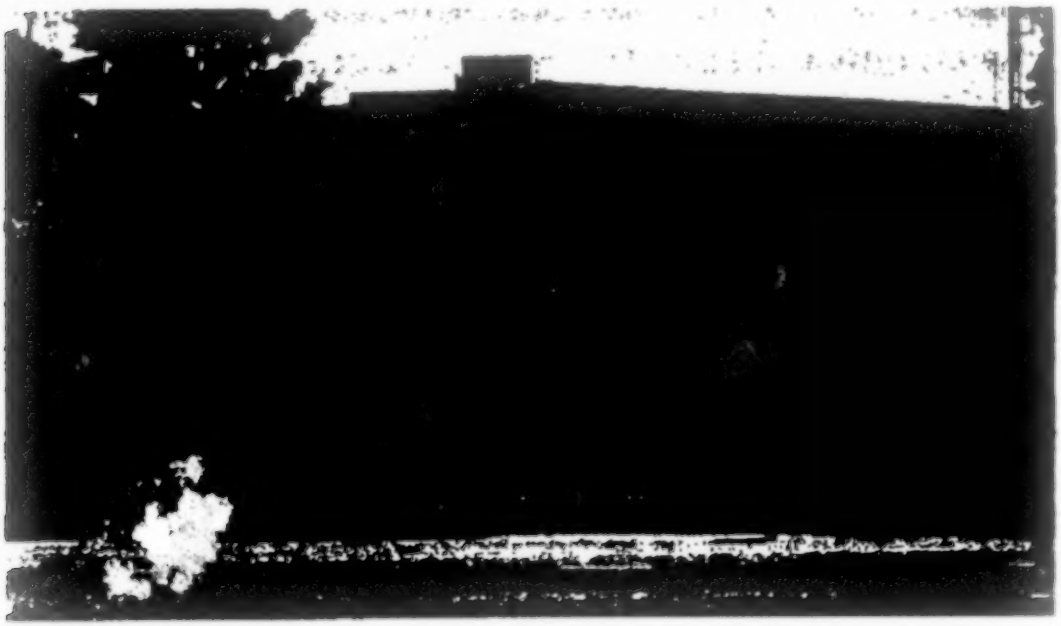
Wilson and Dickinson fought the condemnation in state court and hung a protest banner to tell the public what the city was trying to do to them. The banner attracted intense support from the community – and the ire of the Old Dominion University's Real Estate Foundation, the party who would benefit from the taking. Only days after the banner was unveiled, a University official complained to the city,[8] and the

---

[8] The specter of selective enforcement is often present in sign disputes, as facially-discriminatory sign codes make it easier for government officials and politicians to try to silence opposition. In *Neighborhood Enterprises*, for example, the same alderman who introduced the ordinance authorizing eminent domain against Sanctuary's property wrote a letter to the Board of Adjustment urging it to uphold the denial of Sanctuary's sign permit for the protest mural. Brief of Plaintiffs for Summary Judgment at 3, *Neighborhood Enterprises, Inc. v. City of St. Louis*, No. 4:07-cv-01546 (E.D. Mo. Mar. 16, 2009). And in *Wagner v. City of Garfield Heights*, a city cited a homeowner's lawn sign

(Continued on following page)

city cited *amici* for the banner being too large under the sign code. *Id.* at 2-5. Facing thousands of dollars in fines, Wilson and Dickinson were forced to cover the banner, which silenced them at a critical time during their struggle in state court.[9] Had the banner instead depicted a work of art or the "flag or emblem of any national, organization of nations, state, city, or any religious organization," *id.* at 2, 10-11, however, it would have been exempt from regulation.



Amici Bob Wilson and Kelly Dickinson's protest banner, before Norfolk forced them to cover it with a tarp.

---

that criticized a city councilmember after the councilmember complained to the mayor and the city's building commissioner. No. 13-3474, 2014 U.S. App. LEXIS 15984, at *4-5 (6th Cir. Aug. 19, 2014). Sign-code precedent is packed with such examples.

[9] The Virginia Supreme Court subsequently found that Norfolk's attempted taking of the property violated state law. *PKO Ventures, LLC v. Norfolk Redev. & Hous. Auth.*, 747 S.E.2d 826 (Va. 2013).

Despite that, the district court ruled against Wilson and Dickinson and upheld the sign code. Citing to *Ward* and *Hill*, the court held that the sign code was not content-based because "the general purpose of the Sign Code is to promote traffic safety and aesthetics" and its preference for government and religious flags reasonably related to those purposes because the court felt that flags, emblems, and art-work were more aesthetically pleasing and were less likely to distract drivers. *Id.* at 8, 10-11. The case is now on appeal before the Fourth Circuit.

B. The Misapplication of Established First Amendment Doctrine Has Created Confusion in Other Areas.

The content-based confusion affects more than just sign codes. It has bled into several other areas under the First Amendment, including new topics like occupational speech and long-litigated areas like bans on panhandling and noise ordinances.

1. Occupational Speech

Although occupational speech is a cutting-edge area under the First Amendment, it is already suffering from the same problems that sign-code litigation has been suffering from for years. This Court has held that "[g]enerally, speakers need not obtain a license to speak," *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 802 (1988), but many jurisdictions impose licensing requirements on occupations that consist

largely of speaking, such as interior designers, dieticians, therapists, instructors, and tour guides. These licensing requirements are often triggered solely by speech of a particular content, which under this Court's traditional test should make them content-based. *See, e.g.*, *Holder v. Humanitarian Law Project*, 561 U.S. 1, 27 (2010) (holding that ban on providing legal advice to designated foreign terrorists on how to address their grievances non-violently "regulates speech on the basis of its content"). Nevertheless, in part due to the confusion caused by this Court's differing tests for determining whether a law is content-based or content-neutral, lower courts have struggled to determine what level of First Amendment scrutiny such laws should receive.

Amici Candance Kagan and Mary Lacoste have been caught up in this struggle. Both retired, these women spend their time giving history and ghost tours of New Orleans – but every time they do so, they risk five months in jail. That is because the city requires that anyone describing city history or points of interest for compensation must be licensed, which requires applicants to pass a history exam, drug test, and a criminal background check every two years. *Kagan v. City of New Orleans*, 753 F.3d 560, 561 (5th Cir. 2014). *Amici* object to this license requirement, and their case has already spent years and dozens of pages arguing whether the city's facially discriminatory law should be construed as content-based.

Despite the fact that the law burdens only speech on certain topics, both the district court and the Fifth

Circuit held the license requirement was a valid content-neutral restriction. Yet they could not agree on a reason: The district court was in lock-step with the *Ward* camp, finding that "while the licensing scheme does, in operation, 'refer[ ] to the content of expression' . it clearly was not enacted to suppress 'expression due to a disagreement with the message conveyed or a concern over the message's direct effect on those who are exposed to it.'" *Kagan v. City of New Orleans*, 957 F. Supp. 2d 774, 778 (E.D. La. 2013) (internal citation omitted). The Fifth Circuit affirmed that the license requirement was content-neutral, but merely reasoned that once a license was obtained, "[t]hose who have the license can speak as they please." *Kagan*, 753 F.3d at 562.

Amici Tonia Edwards and Bill Main challenged an almost identical license requirement for tour guides in D.C. Three weeks after the Fifth Circuit opinion, the D.C. Circuit found the license requirement was unconstitutional. *Edwards v. District of Columbia*, 755 F.3d 996, 1001-02 (D.C. Cir. 2014). After extensive briefing on whether the district's tour-guide licensing law was content-based, the D.C. Circuit avoided taking sides on this thorny issue, instead deciding that the regulation could not survive even intermediate scrutiny because the District had provided no evidence that licensing tour guides furthered any of its goals. *Id.* at 1009.

2. Panhandling Bans

Meanwhile, federal and state courts are all over the map on whether laws banning begging are content-based. The Seventh Circuit discussed this confusion at length before rejecting a challenge to an Indianapolis ordinance severely limiting begging in public places, but allowing all other forms of public solicitation. *Gresham v. Peterson*, 225 F.3d 899, 901 (7th Cir. 2000). The Seventh Circuit went out of its way to point out that "[c]olorable arguments could be made both for and against" the ordinance being content-neutral. *Id.* at 905. On the one hand, this Court's decision in *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993), suggested that the law was content-based under this Court's traditional approach because "[o]nly by determining the specific content of a solicitor's speech could authorities determine whether they violated the ordinance." *Id.* But on the other hand, the Seventh Circuit recognized that the purpose-based test derived from *Ward* and *Hill* suggested that the ordinance was content-neutral because the government had a neutral justification for the restriction. *Id.* at 905-06. Rather than correctly applying both tests, the Seventh Circuit avoided the topic entirely by relying on the fact that the parties had (oddly) conceded the ordinance was content-neutral. *Id.* at 906; *see also State v. Boehler*, 262 P.3d 637, 642-43 (Ariz. Ct. App. 2011) (outlining circuit split on this issue, where at least four courts have found similar ordinances content-based while two have found them to be content-neutral).

3. Noise Ordinances

Case law regarding noise ordinances is also a victim of the split. Many jurisdictions limit the amount of noise that can emanate from various fixed and mobile sources, including vehicles. Although blanket restrictions would be content-neutral, *see Kovacs v. Cooper*, 336 U.S. 77 (1949), some jurisdictions exempt certain noises from regulation depending on either their message or who is speaking.

Due to the muddled nature of the content-neutral/content-based jurisprudence, courts addressing challenges to these exemptions cannot agree whether they are content-based. *Compare State v. Catalano*, 104 So. 3d 1069 (Fla. 2012) (concluding law forbidding vehicles from emitting sounds that could be heard 25 feet away, but which exempted motor vehicles used for business or political purposes, was content-based), *and People v. Jones*, 721 N.E.2d 546, 552 (Ill. 1999) (concluding state sound amplification statute was content-based when it exempted advertising and thus "expressly prohibits some speech and allows other speech based upon the nature of the message being broadcast"), *with State v. Brownfield*, No. CA2012-03-065, 2013-Ohio-1947 (Ohio Ct. App. May 13, 2013) (holding sound ordinance content-neutral despite exempting ice-cream trucks because exemption's purpose was for safety, not message suppression).

III. To End This Widespread Confusion, the Court Should Make Clear That There Are Two Tests for Determining Whether a Law Is Content-Based and That Courts Must Apply Them Both When Analyzing Speech Restrictions.

The conflicts that *amici* have identified have arisen because lower courts mistakenly believe that *Ward*'s purpose-based inquiry is in fact the only inquiry they must undertake. But recent precedents make clear that this Court continues to categorize laws that turn on the content of one's speech as content-based irrespective of whether they were passed for censorial reasons. *Humanitarian Law Project*, 561 U.S. at 27; *United States v. Stevens*, 559 U.S. 460, 468 (2010) (holding that law's terms rendered it content-based). This Court should remind lower courts of its statement in *Turner Broadcasting System, Inc. v. FCC* that "while a content-based purpose may be sufficient in certain circumstances to show that a regulation is content-based, it is not necessary to such a showing in all cases. Nor will the mere assertion of a content-neutral purpose be enough to save a law which, on its face, discriminates based on content." 512 U.S. 622, 642-43 (1994) (citations omitted).

Two years ago, this Court in *United States v. Jones*, 132 S. Ct. 945 (2012), resolved a similar problem with respect to Fourth Amendment precedent. Traditionally, the government committed a search for

Fourth Amendment purposes when it trespassed to gather information. *See Kyllo v. United States*, 533 U.S. 27, 31 (2001) (discussing property-rights focus of early Fourth Amendment case law). But as technology improved, so did the government's ability to conduct surveillance without physically intruding on one's property. In response, the Court in *Katz v. United States* explained that even when the government committed no trespass, it conducted a search for Fourth Amendment purposes if it infringed on one's "reasonable expectation of privacy." 389 U.S. 347, 360 (1967) (Harlan, J., concurring).

The *Katz* reasonable expectation of privacy test quickly became the centerpiece of Fourth Amendment jurisprudence, but it was not without its faults. Most importantly, to the extent a person lacked a reasonable expectation of privacy, *Katz* permitted the government to search without constitutional consequence. *See United States v. Knotts*, 460 U.S. 276, 281-82 (1983) (holding that monitoring vehicle's movements on public roads was not a search). This was particularly problematic when construing the warrantless placement of GPS tracking devices, which allowed police to know the constant whereabouts of a vehicle for an extended period of time. Some lower courts invoked a modified version of *Katz* that looked at the overall "mosaic" that long-term GPS monitoring painted, *United States v. Maynard*, 615 F.3d 544 (D.C. Cir. 2010), but most held that no Fourth Amendment search had occurred. *See, e.g.*,

United States v. Pineda-Moreno, 591 F.3d 1212 (9th Cir. 2010).

The majority in *Jones* resolved this problem by reminding lower courts that *Katz* was not the sole test for whether a search had occurred. 132 S. Ct. at 952. Stating that "the *Katz* reasonable-expectation-of-privacy test has been *added to*, not *substituted for*, the common-law trespassory test," *id.*, the Court explained that the government committed a search for Fourth Amendment purposes either when it (1) physically invaded one's property for the purpose of acquiring information, *id.* at 949, or (2) infringed on one's reasonable expectation of privacy. *Id.* at 950. Finding that the former had occurred in Jones' case, the Court held that admitting the evidence that the government had collected violated the Fourth Amendment. *Id.* at 954.

This Court should do for the First Amendment what it did in *Jones* for the Fourth Amendment. *Ward*'s inquiry into legislative purpose was "added to, not substituted for" this Court's traditional test, and speech restrictions are content-based *either* when (1) the law requires the government to look at the content of one's speech in determining whether or not it is subject to regulation, *or* (2) it is motivated by antipathy toward a particular subject matter or viewpoint. By reminding lower courts that both tests are valid and that they should employ them both whenever scrutinizing a speech restriction, this Court

can protect First Amendment rights and ensure that laws that turn on the content of one's speech are judged under the proper standard.

CONCLUSION

More than twenty years ago, this Court added to its traditional test for whether a law is content-based when it said that the government's purpose also matters and that a facially neutral law is subject to strict scrutiny if "the government has adopted a regulation of speech because of disagreement with the message it conveys." *Ward*, 491 U.S. at 791. But many lower courts now erringly view *Ward* as the sole test for content neutrality, and subject facially discriminatory laws only to the relatively lax standards meant for time, place, and manner restrictions. As *amici* have demonstrated, this has occurred not only in the sign context, but throughout the First Amendment, and it has led to speakers not receiving the full speech protections they are due. To correct this legal misstep, the Court should take this opportunity to make clear that a law should be treated as content-based and therefore subject to strict scrutiny *either* (1) if it requires the government to look at the content of one's speech in determining whether or not it is subject to regulation, *or* (2) when its purpose is to censor messages with certain subject matters or viewpoints. Only by consistently employing both of these tests can the courts protect against the erosion

of First Amendment rights that the exclusive invocation of *Ward*'s purpose-based inquiry has engendered.

Respectfully submitted,

INSTITUTE FOR JUSTICE
WILLIAM H. MELLOR
ROBERT P. FROMMER*
ERICA J. SMITH
901 North Glebe Road
Suite 900
Arlington, VA 22203
Tel: (703) 682-9320

**Counsel of Record*

Counsel for Amici Curiae